Supreme Court, U.S.
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NO.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

RITA FULLER, BABBETTE THAYER, THOMAS WILSON, and the class of similarly situated persons who have worked aboard the F/T MICHELLE IRENE,

Petitioners,

v.

GOLDEN AGE FISHERIES, SIMONSON ENTERPRISES V, INC., MICHELLE IRENE JOINT VENTURE, WESTCOD II, INC., BTI IV, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 21, 1994

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I. QUESTIONS PRESENTED FOR REVIEW

A. Is a clause in seamen's employment contracts that purports to limit the seamen's time to bring claims under the contract to six months enforceable against the seamen, who are wards of the federal admiralty court, when the clause was not negotiated, not supported by consideration, and where the seamen did not understand the consequences of the limitation clause, nor even realize that the clause was present in their contracts?

B. Does 46 U.S.C. § 10602, which gives to those fishermen (a) who sign written employment contracts and (b) whose fish are "delivered to the owner for processing and sold," a remedy for an accounting, for punitive damages if the accounting is not rendered, and for wages, so occupy the field of fishermen's wage claims that it preempts the ancient maritime common law right of fishermen to a wage lien?

II. PARTIES

Rita Fuller, Babbette Thayer, Thomas Wilson and the class of similarly situated persons who worked aboard the F/T *Michelle Irene* were the plaintiffs and appellants below, and are the petitioners here.

Golden Age Fisheries, Simonson Enterprises V, Inc., Michelle Irene Joint Venture, Westcod II, Inc., BTI IV, Inc., BTI VII, Inc., Bellingham Trawlers, Inc., Simonson Investments, Inc., Stanley Simonson and Jane Doe Simonson, James Talbot and Jane Doe Talbot, and F/T *Pacific Orion* (formerly *Michelle Irene*), official number 940866 were defendants and respondents below and are respondents here.

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V. OPINIONS BELOW

The United States District Court for the Western District of Washington dismissed plaintiffs' claims on summary judgment. *Fuller v. Golden Age Fisheries*, 1992 AMC 1696 (W.D. Wash. 1992)(See App. B). The Court of Appeals for the Ninth Circuit affirmed. *Fuller v. Golden Age Fisheries*, 14 F.3d 1405 (9th Cir. 1994)(See App. A).

VI. JURISDICTIONAL STATEMENT

The Court of Appeals opinion was filed on January 24, 1994. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254 (1).

VII. RELEVANT STATUTES

The following statutes are relevant to this matter:

46 U.S.C. §10601. Fishing agreements

> (a) Before proceeding on a voyage, the master or individual in charge of a fishing vessel, fish processing vessel, or fish tender vessel shall make an (sic) fishing agreement in writing with

each seaman employed on board if the vessel is--

(1) at least 20 gross tons; and
(2) on a voyage from a port in the United States.

(b) The agreement shall be signed also by the owner of the vessel.

(c) The agreement shall--

(1) state the period of effectiveness of the agreement;
(2) include the terms of any wage, share, or other compensation arrangement peculiar to the fishery in which the vessel will be engaged during the period of the agreement; and
(3) include other agreed terms.

46 U.S.C. §10602. Recovery of wages and share of fish under agreement.

(a) When fish caught under an agreement under section 10601 of this title are delivered to the owner of the vessel for processing and are sold, the vessel is liable in rem for the wages and shares of the proceeds of the seamen. An action under this section must be brought within six months after the sale of the fish.

(b)(1) In an action under this section, the owner shall produce an accounting of the sale and division of proceeds under the agreement. If the owner fails to produce the accounting, the vessel is liable for the highest value alleged for the shares.

(2) The owner may offset the value of general supplies provided for the voyage and other supplies provided the seaman bringing the action.

(c) This section does not affect a common law right of a seaman to bring an action to recover the seaman's share of the fish on proceeds.

VIII. STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This class action lawsuit for seaman's wages was filed on October 6, 1991 by plaintiffs Rita Fuller, Babbette Thayer and Thomas Wilson as representatives of a class of approximately 300 seamen who worked aboard the factory trawler *Michelle Irene*.[1] The defendants are the vessel, its owners,

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[1] The class covers crew members who worked aboard the vessel from September 23, 1989 to November 21, 1990. Subsequently, the *Michelle Irene* was renamed the *Pacific Orion*.

In 1993, an *in rem* action was commenced against the vessel by Key Bank of Washington, which sought to foreclose a preferred ship mortgage. *Key Bank of Washington et al. v. Pacific Orion*, No. C93-806Z, (W.D. Wash.) Plaintiffs Fuller et al. have intervened in that action to preserve their *in rem* claims while this case is on review.

its managing agent - Golden Age Fisheries - and the partners of Golden Age Fisheries.

The defendants contracted to pay wages equal to a percentage of the estimated fair market value of the seafood caught and processed by the *Michelle Irene*. Plaintiffs allege that defendants breached their employment contracts by intentionally underestimating the value of fish produced by the vessel. Plaintiffs also allege that defendants failed to distribute to the crew its agreed percentage of that underestimated value, which further diluted plaintiffs' pay.[2]

Plaintiffs' *in personam* wage claims were dismissed on summary judgment pursuant a clause in defendants' contract form that

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[2] Plaintiffs also alleged that defendants failed to pay the minimum wage required by the laws of the State of Alaska. The District Court held that Alaska's minimum wage laws were preempted by the Fair Labor Standards Act and the Court of Appeals affirmed. Plaintiffs do not seek review of that portion of the Court of Appeals decision.

required plaintiffs to bring wage claims within six months of the end of each voyage, and plaintiffs' *in rem* wage claims were dismissed pursuant to a limitation period contained in 42 U.S.C. §10602. *Fuller v. Golden Age Fisheries*, 1992 AMC 1696 (W.D. Wash. 1992)(App. B). The Court of Appeals for the Ninth Circuit affirmed. *Fuller v. Golden Age Fisheries*, 14 F.3d 1405 (9th Cir. 1994)(App. A).

Plaintiffs seek review here because this case involves important issues of maritime law -- whether the shipowner can, by contract, impose a six month limitation period on the assertion of seamen's wage claims, and whether Congress has by implication legislated a six month limitations period for all fishermen's wage claims.

The first question turns on whether the Court's traditional protection for its wards, the seamen of this nation, shall retain any real meaning. The courts below

granted summary judgment against the plaintiff seamen based on a six month limitation period contained in the defendants' adhesion contract, despite uncontradicted testimony that (a) there was no consideration for the limitation provision, (b) most of the seamen were not given copies of their contracts, and (c) none of the seamen knew that the limitation provision was contained within their contracts, or had any understanding of its significance. The decision of the Court of Appeals enforcing the shipowner's six month limitation clause acknowledges -- but in reality ignores -- the close scrutiny that this Court demands be given any attempt to diminish the rights of seamen. *See Garrett v. Moore-McCormack Company*, 317 U.S. 239 (1942).

The second question turns on whether Congress intended 42 U.S.C. §10602, which was first enacted by the Second Congress for the sole purpose of ensuring that cod

fisherman receive government salt allowances, to preempt the lien rights enjoyed since ancient times by fishermen as security for their wages. The language of the statute, and the history of its enactment and amendment, show that Congress intended that the statute be an alternate remedy available to fishermen - not the fishermen's sole remedy for unpaid wages. The holding of the courts below is contrary to this court's decisions on the construction of statutes in derogation of the general maritime law, and contrary to the presumption that ambiguous legislation shall be read in a way that is favorable to seamen. *See, Isbrandtsen v. Johnson*, 343 U.S. 779 (1952).

B. Facts Relevant to the Issues on Review

1. The Nature of the Work

The *Michelle Irene* is a modern factory trawler that employs approximately 95 crew members whose job responsibilities include

fishing, fish processing and vessel operation. The vessel leaves on month-long voyages from Dutch Harbor, Alaska for fishing and processing operations in the Bering Sea or the Gulf of Alaska, returning only when her hold is full.

During the class period crew members generally signed contracts to work aboard the vessel for 90 straight days, approximately three fishing trips, after which they recuperated back home. The crew worked brutal hours -- 16 hours a day, seven days a week while the vessel was at sea. After the conclusion of each fishing trip, the vessel was in port no more than 2 or 3 days to unload its catch and take on supplies, all duties which had to be performed by its crew. Then the crew went back to sea again for another month of 16 hour days, another port call, and back out again for one more month at sea until their contracts were finally up.

The *Michelle Irene* is one of over 60 factory trawlers that fish the waters of the Bering Sea and the Gulf of Alaska. These trawlers have taken over an industry that was once the province of fleets from Japan, Korea and the Soviet Union. Many thousands of Americans now work in the Alaskan factory trawler fleet.

2. Defendants' Breach of Contract

Defendants paid the crew of the *Michelle Irene* on a "crewshare" basis, which is the way in which fishermen have been paid throughout the ages. Each crew member signed a written contract in which defendants promised to set aside for the crew 26.086% of the "estimated ex-vessel fair market value of the saleable product, FOB Alaska." (App. C at ¶ 10). The defendants promised that each crew member would get a share of the funds set aside equal to his or her individual crewshare, divided by the

sum of the crewshares held by all crew members aboard. (*Id.*)

Defendants breached their crewshare agreements in two ways. First, defendants used a fraction of the real value of the catch when computing crewshares. Defendants sold most of the *Michelle Irene*'s fish in Japan on consignment. Each time the vessel delivered fish to a tramper in Dutch Harbor, defendants' consignment broker, Kyokuyo Co., Ltd., furnished defendants with a detailed estimate of the market value of the product.[3] Defendants admit that they based crewshares, not on the full value of this estimate, but on only 90% of it. If the Kyokuyo estimate was the most accurate estimate available when the crew was paid (and defendants have

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[3] The fish was later sold by Kyokuyo in Japan, long after the voyage ended and the crew had been paid.

produced no other), then plaintiffs have been deprived of 10% of their wages.

Second, defendants failed to pay the crew the full 26.086% of the catch that they had promised to pay. Instead, defendants kept a portion of the crew's share of the estimated value of the catch for themselves. Documents produced by defendants show that, depending on the trip, defendants held back, and kept for themselves, between 4.6% and 18.0% of the portion of the catch that belonged to the crew.

3. The Six Month Limitation Provision and the Defendants' Failure to Explain It

The contracts that defendants gave the crew to sign consisted of five pages of single-spaced type. They were drafted by defendants and presented to plaintiffs on a take it or leave it basis. All of the contracts signed by the plaintiffs contained a provision purporting to require

the plaintiffs to bring any claims within six months.[4]

Defendants' contracts were unquestionably contracts of adhesion. Out of over 400 contracts signed by crew members covering the relevant time period, not one DISPUTES paragraph, the paragraph that contained the limitation provision, was altered one iota as a result of a negotiation with a crew member.

The crew members had no notion of any rights they might be giving up by "agreeing" to the DISPUTES clause. Defendants

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[4] Two different forms of this provision were used during the class period. One version provided:

> . . . Crewmember agrees that any legal action commenced by Crewmember in connection with this Agreement shall be brought within six (6) months after the date of the action or shall thereafter be waived. . . .

The other version provided:

> . . . Any claim for money arising out of this agreement or employment relationship between crewmember and owner shall be made in writting (sic) within six (6) months after this agreement is terminated; otherwise, such claim shall be deemed waived.

(See *e.g.* App. C at ¶ 15).

admit that they did not discuss with crew members the rights they were giving up. The agents of defendants who dealt with the crew members conceded in deposition that they themselves did not know the limitation period for crew wage claims in the absence of a contractual limitation provision. Consequently, they were unable to advise crew members of the rights they were giving up by agreeing to bring claims in six months.

Defendants also left most crew members with no chance to discover the six month limitation after they realized that they had some claim to make. The representative plaintiffs were not given copies of their contracts.[5] The defendants even refused to honor the express requests of one represen-

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[5] Although defendants claim that they offered crew members copies of their contracts (a claim disputed by some crew members), they admit that a majority of the crew members did not actually get copies.

tative plaintiff, Rita Fuller, that copies be sent to her home address.

Consequently, the plaintiffs did not learn of the limitation period contained within their contracts until defendants produced them after this lawsuit was filed.

4. The Difficulty of Discovering Claims Within Six Months

It was very difficult for these seamen to discover they had claims in the six months their contracts purported to allow. The crewshare settlement sheets furnished by defendants contained no information which would alert the crew to the fact that their crewshares had not been paid in accordance with the terms of their agreements. The settlement sheets showed an "extended value" figure upon which each individual's crewshare had been calculated. (App. D) The crew was not told that "extended value" really meant 90% of the broker's estimate of the real value. The

crew was not even furnished with an accounting of the various species of fish caught and products produced so they could make their own estimate of the value of those products. Moreover, although the settlement sheets showed the individual crew member's percentage of the total "extended value," they did not show the aggregate percentage paid to the whole crew, which would have disclosed that defendants were not paying the crew the full 26.086% that they had promised to pay.

The only way for plaintiffs to discover whether they had a claim was to obtain and analyze copies of defendants' accounting records, which is a task they could hardly do in the six months allowed them by their contracts, even assuming that they had enough notice of a claim to realize they should be demanding records from the company.

The courts below held that the representative plaintiffs should have known they had claims because of a prior lawsuit against most of the same defendants brought by crew members who worked aboard the *Michelle Irene* during an earlier period. *Adamek v. Golden Age*, No. C89-1463R (W.D. Wash.) However, plaintiff Babbette Thayer was not even part of the *Adamek* class, and plaintiffs Rita Fuller and Tom Wilson were only *unnamed* class members.

Adamek settled for $510,000, plus plaintiffs' attorneys fees, and checks were sent out to Ms. Fuller, Mr. Wilson and the other class members in August 1991. It was not until plaintiffs got their checks that they realized that the claims that others had asserted in *Adamek* might be real. They then acted promptly and brought this suit in less than 90 days.

IX. REASONS FOR GRANTING THE WRIT

A. Whether Shipowners Can Impose a Six Month Limitation Period On Seamen's Claims In an Adhesion Contract Is an Important Question That Was Resolved Below in a Way That Conflicts With Precedent in This Court

The protection of seamen has been an important goal of our federal court system since its earliest days. "The maritime law by inveterate tradition has made the ordinary seaman a member of a favored class." *Warner v. Goltra*, 293 U.S. 155, 162 (1934). The Court of Appeals' holding that a shipowner can impose a six month limitation period upon wage claims asserted by members of this favored class is a substantial departure from this tradition that should be reviewed by this Court.

1. Seamen Are the Wards of the Court Entitled to Special Protection Under Admiralty Law

> Seamen, like the plaintiffs here, are emphatically the wards of the admiralty; and . . .they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with

> their expectancies, wards with their guardians, and *cestuis que trust* with their trustees.

Garrett, 317 U.S. at 246, quoting *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823)(No. 6,047). The classic statement of the traditional deference given to seamen's rights by the federal courts was made in 1823 by Justice Story:

> [T]he most rigid scrutiny is instituted into the terms of every contract in which they [seamen] engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which is not compensated by extraordinary benefits on the other, judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party and that pro tanto the bargain ought to be set aside as inequitable.

Harden v. Gordon, 11 F. Cas. at 485.

The characterization of seamen as wards of the court is based on their unique position in society:

> From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his

> personal liberty during the life of the contract.

Robertson v. Baldwin, 165 U.S. 275, 282-83 (1897). It is also based on the unusual degree of bargaining power that employers have over seamen:

> If their employers chose to impose upon them hard terms, they are obliged to take what is offered to them and meet their immediate wants or forthwith to reship on another vessel. They are thus placed too much in the power of the owners to be able to negotiate with them on equal terms.

The David Pratt, 7 F. Cas. 22, 24 (D.C. Me. 1839) (No.3,597)[6] Consequently, the federal court's traditional protection of seamen has its greatest significance where the right to recover wages is implicated:

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[6] *See also Capotorto v. Compania Sud Americana de Vapores, Chilean Line, Inc.*, 541 F.2d 985, 987 (2d Cir. 1976) (the notion of seamen as wards of the court stems in part from "the particularly authoritarian relationship of shipowners and their representatives to seamen and the isolation of the latter from the legal, economic and psychological support of the land based community"); *Harris v. Lykes Bros. Steamship Co., Inc.*, 375 F. Supp. 1155, 1157 (E.D. Tex. 1974) (the notion stems from the nomadic nature of seamen and the perils they encounter at sea).

> It is the established policy of the maritime law to protect from **any** impairment the seaman's historic right to wages for the term of his employment.

Vitco v. Joncich, 130 F. Supp. 945, 951 (S.D.Cal. 1955) (emphasis added), *aff'd*, 234 F.2d 161 (9th Cir. 1956).

The policy of extending special protection to seamen is reaffirmed from time to time by this Court, which repeated in *Isbrandtsen*, 343 U.S. at 783, what it had said in the late 19th century: "the ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly." *Id.*, *quoting Robertson v. Baldwin*, 165 U.S. 275, 287 (1897). In *Isbrandtsen*, this Court quoted from the leading treatise on the law of seamen:

> In my dealings with seamen, a class with whom I come in frequent contact, I find that they are perhaps better educated and better dressed than their fellows of a century ago, but, in general, as improvident and prone to the extremes of trust and suspicion as their forebears who ranged the seas, but withal a likeable lot.

Id. at n.5, *quoting* 1 Norris, *The Law of Seamen* (1951), Preface.

2. The Limitation Provision Is Unenforceable Because It Is Not Fair, Fully Understood By the Seamen, Nor Supported by Adequate Consideration

A contractual provision that impinges on a seaman's rights is enforceable against a seaman, only if the provision would be enforceable had a fiduciary imposed it upon his beneficiary.

> The analogy suggested by Justice Story [in *Harden v. Gordon*] between seamen's contracts and those of fiduciaries and beneficiaries remains, under the prevailing rule treating seamen as wards of admiralty, a close one. Whether the transaction under consideration is a contract, sale or gift between guardian and ward or between trustee and cestui, the burden of proving its validity is on the fiduciary. He must affirmatively show that no advantage has been taken; and his burden is particularly heavy where there has been inadequacy of consideration.

Garrett v. Moore-McCormack, 317 U.S. at 247.

The mode of analysis required by this court in *Garrett* has long been followed in the federal admiralty courts:

> Whenever . . . any stipulation is found in the shipping articles, which derogates from the general rights and privileges of seamen, courts of admiralty hold it void . . . unless two things concur: first, that the nature and operation of the clause is fully and fairly explained to the seamen; and secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby.

Brown v. Lull, 4 F. Cas. 407, 409 (C.C. Mass. 1836)(No. 2,018).[7]

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[7] See also *Harmon v. United States*, 59 F.2d 372, 373 (5th Cir. 1932) ("[O]ne who claims that a seaman has signed away his rights. . .must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman. . . . This rule of course is most rigidly applied to clauses in shipping articles."); *Elliott v. Pacific Far East Line, Inc.*, 230 F.2d 238, 240 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955) (mutual release held enforceable because the seaman entered into it "without complete understanding of the situation"); *Lewis v. Texaco, Inc.*, 527 F.2d 921, 925 (2d Cir. 1975) (seamen's releases of wage claims did not bar suit where the seamen were not made fully aware of their statutory rights prior to settlement); *The Sarah Jane*, 21 F. Cas. 449, 452 (S.D.N.Y. 1833) (No. 12,348) ("Every stipulation binding a seaman, beyond the rate of wages, the time of their payment and the voyage to be performed, is . . . looked upon with distrust, and is closely scrutinized before it is executed . . .)

Garrett held that the release with which the court was than dealing would be held valid only if the shipowner carried his burden of showing that:

> it was executed freely, without deception or coercion, and that it was made by the seaman with a full understanding of his rights. The adequacy of consideration and the nature of the . . . advice available to the seaman at the time of signing the release are relevant to an appraisal of that understanding.

Garrett 317 U.S. at 248. The limitation at issue here survived scrutiny only because the courts below failed to follow the analysis demanded by *Garrett*.

Heightened scrutiny is warranted here because defendants gave no consideration to the crew for their agreement to the short limitation period. By agreeing to the limitation period, they gave up a valuable right. Absent the contractual limitation period, seamen's wage claims against their employer are time-barred only by the doctrine of laches. *Espino v. Ocean Cargo*

Line, Ltd., 382 F.2d 67, 69 (9th Cir. 1967)(Laches will bar a seaman's claim only if the delay in commencing the action is inexcusable, and the defendants are prejudiced by the delay.)[8] By signing their contracts the crew gave up the often lengthy time period allowed by the laches doctrine, and they got nothing in return.

There was no evidence in the record to support a finding that the defendants carried their burden of showing that the plaintiffs had a full understanding of the rights they were giving up by agreeing to the six month limitation period. The defendants' behavior does not withstand any analysis, let alone the heightened scrutiny that *Garrett* demands.

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[8] Plaintiffs' claims would not be barred by laches here. They filed suit only 11 months after the conclusion of the last voyage at issue, and defendants do not contend that the delay prejudiced them in any way.

No one ever explained to plaintiffs the rights they had. Neither the plaintiffs, nor the defendants' agents with whom they dealt, were aware that seamen's wage claims are governed by the doctrine of laches in the absence of a limitation period.[9] And no one ever bothered to point out the limitation period to the crew in a way they would notice it. It is undisputed that the plaintiffs did not learn that they had only six months to bring their claims until this lawsuit was filed.

Defendants did not even provide most crew members with copies of their contracts. Most of the crew had no chance to discover the limitation provision once they suspected they might have a claim, and, consequently had no idea that they needed

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[9] Washington law gives those who sign written contracts six **years** to bring those claims. Wash. Rev. Code 4.16.040. Needless to say, none of defendants' agents explained to the seamen that, as to their state law claims, they were exchanging that six year period for a six month period.

to move quickly to preserve their rights. Shipowners must do more than defendants did here to satisfy the high standard to which a fiduciary is held in his dealings with his beneficiary.

Even if defendants had told the crew members of the limitation provision and of the rights they were relinquishing, the clause in question should still be stricken as inherently unfair. At the time the defendants drafted this clause, they knew just how little information would be available to crew members when they received their pay. Defendants knew that the limited information they would supply the crew would not alert them to the possibility of a claim. They knew that the crew would have little chance of bringing their claims within the six month period that their contract demanded.

The information defendants did not reveal in their settlements with the crew

was crucial to the crew's ability to discover whether they had a claim. The crewshare agreements provided that shares would be calculated based on an "estimated value." (App. C at ¶ 10). When it came time to pay shares, defendants did not tell the crew that they were paying shares based on less than the full estimate; they did not even tell the crew the price they were using for any particular species of fish. There was no way for a crew member to know that he was not being paid the full value of the catch. (See Settlement Sheet -- App. D).

Another significant omission in defendants' accounting is their failure to tell plaintiffs the total number of crewshares issued on any voyage. Without this information, crew members had to trust that defendants calculated correctly the ratio of each individual crew member's share to the total number of shares. But, again defen-

dants deceived the crew, this time by failing to tell them that some of their crewshares were being siphoned off to the owners' own bank account. These practices, and defendants' concealment of them, are glaring examples of overreaching by defendants, who are supposed to act as fiduciaries in their dealings with their beneficiaries.

By attempting to limit the crew members' rights to question their pay to a six month period, defendants knowingly placed these crew members in an untenable position. Many of them were off on their next voyage within days or weeks after they were paid. For many crew members much of the six months given them by their contracts ran while they were at sea, unable to communicate with a lawyer, away from the courthouse, and, all the while, under their employers' close control.

The way in which plaintiffs were taken advantage of here demonstrates that they are just as susceptible to the influence exerted by shipowners as the seamen of yore. Like seamen of the nineteenth century, they were "placed too much in the power of the owners to be able to negotiate with them on equal terms." *The DAVID PRATT*, 7 Fed. Cs. at 24. The limitation clause that the *Michelle Irene* crew had thrust upon them is inherently unfair, and, under the analysis demanded by *Garrett*, unenforceable.[10]

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[10] Even outside the maritime law of seamen's contracts, the provision at question would fail under the facts of this case. Where a party to an adhesion contract has not had adequate opportunity to learn of a time limit provision, it will not be enforced. *See Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11, 17 (2d Cir. 1968)(limitation in passenger ticket unenforceable unless steamship company did "all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights."); *Muratore v. M/S/ Scotia Prince*, 845 F.2d 347 (1st Cir. 1988)(refusing to enforce time bar provision in passenger ticket where cruise line failed to deliver a copy of the contract to the passenger), *accord Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983).

The contrary decision of the Court of Appeals was only reached because the Court misapplied the precedent discussed above. The Court of Appeals held that the facts outlined did not "present a genuine issue of material fact about whether the signing of the contracts involved fraud or coercion." 14 F.3d at 1408 (App. A at 12-13). For support of that statement the Court noted only that the seamen had time to review their contracts before signing, if they wished to do so. The Court of Appeals did not hold the employer to his burden of showing that the contract "was executed freely, without deception or coercion, and that it was made by the seaman with a full understanding of his rights." *Garrett* 317 U.S. at 248. It was enough for the Court of Appeals that the seamen had not proven fraud; it did not matter to the Court of Appeals whether the seamen actually had any real understanding of what they were doing.

The Court of Appeals failed to follow the analysis demanded by this Court. The petition should be granted to determine the enforceability of a short limitation period in seamen's wage contracts.

B. Whether §10602's Narrow Wage Claim Remedy Preempts the General Maritime Remedy of Fishermen to Sue Their Vessels Is an Important Question That Was Resolved Below in a Way That Conflicts With Precedent in This Court

This court has consistently held that statutes affecting the remedies available to seamen must be construed to improve the lot of seamen:

> Marine legislation, at least since the Shipping Commissioners Act of June 7, 1872, 17 Stat 262, should be construed to make effective its design to improve the lot of seamen.

Isbrandtsen v. Johnson, 343 U.S. 779, 783 (1952); *Garrett*, 317 U.S. at 246 ("Congress has generally sought to safeguard seamen's rights."). Since Congress never writes on a clean slate when it comes to federal maritime law, the rules of construction are

different than in other areas. Statutes in derogation of the general maritime law are strictly construed:

> Statutes which invade the . . . general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.

Isbrandtsen, id.; accord, Federal Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 412 (1969) ("[T]he legislative grant of a new [federal maritime] right does not ordinarily cut off or preclude other nonstatutory [federal maritime] rights in the absence of clear language to that effect.")

The Court of Appeals concluded that 46 U.S.C. §10602 cut off lien rights that the general maritime law gave to all fishermen. This conclusion is not warranted by the statutory language, is not supported by the legislative history, and is plainly contrary this Court's holdings on the con-

struction of statutes in derogation of seamen's rights. This Court should grant certiorari to determine the important issue of whether §10602 has cut off the right of fishermen to make wage claims under the general maritime law.

1. The General Maritime Law Has Given Fishermen an *In Rem* Remedy Since the Middle Ages

A fisherman's *in rem* claim arises from general maritime law, which finds its origins in European codes promulgated beginning in the middle ages. *See Mitchell v. Trawler Racer*, 362 U.S. 539, 543 (1960). About a century before our Constitution was adopted, the old codes were comprehensively rewritten in the *Marine Ordinances of Louis XIV*, 30 F. Cas. 1203, enacted in 1681. *Id.* Gilmore and Black call the Marine Ordinances the "classic" "authoritative codification" of the law of the sea. Gilmore and Black, *The Law of Admiralty* at 8 (2d ed. 1975). This Court has called

them "the foundation of all codes." *Tucker v. Alexandroff*, 183 U.S. 424, 442 (1902).

The Marine Ordinances state unequivocally that the "ship and freight shall be specially liable for the seamen's wages." Title Fourth, Article XIX, 30 Fed. Cs. 1210.[11] This ancient seaman's wage lien was incorporated into the admiralty law of the United States by the Constitution when it was enacted in 1789. *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 385-86 (1924). The seaman's wage lien has been consistently recognized since as one of the

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[11] The general maritime law gave this *in rem* claim to fishermen who, like plaintiffs, were paid based on a share of revenues generated during the voyage. In the centuries past it was common for seamen to be compensated based on a share of the revenue generated by the voyage. *Putnam v. Lower*, 236 F.2d 561, 579 (9th Cir. 1956). Shipping on a share of the catch or share of the freight basis was common enough in the middle ages for the ancient codes to expressly recognize the practice. *See e.g. Marine Ordinances of Louis XIV*, at Title Fourth, Article VII, 30 F. Cas. 1203 (referring to seamen who ship "by the profit or freight"); *Laws of Oleron*, at Article XIX, 30 F. Cas. 1171 (comparing rights of those who ship for monthly wages with those who ship for "a share of the freight"); *Laws of Wisbuy*, at Article XXXII, 30 F. Cas. 1189.

fundamental principles of maritime law. *See, e.g., The Mary*, 16 F. Cas. 936 (S.D.N.Y. 1832) (No. 9,186) (Seamen's wage liens "are 'sacred liens,' and as long as a plank remains, the sailor is entitled as against all other persons to the proceeds as security for his wages.") As one Supreme Court Justice said over 130 years ago, the seamen's wage lien is among those "principles of law that have been so long and so well established that it is sufficient to state them without referring to authorities." *Taylor v. Carryl*, 61 U.S. (20 How.) 583 (1858)(Taney, J., dissenting).

2. Congress Expressly Preserved Non-Statutory Remedies in §10602(c)

Section 10602(a) provides an *in rem* remedy for fishermen who fish in a certain way under a written agreement:

> When fish caught under an agreement under 10601 of this title *are delivered to the owner of the vessel for processing and are sold*, the vessel is liable

> in rem for the wages and shares of the proceeds of the seamen. An action under this section must be brought within six months after the sale of the fish.

(emphasis supplied).

The statute gives a remedy **only** to fishermen and fish processors, only if they sign the written agreement required by §10601, and, even then, **only if** their fish "are delivered to the owner of the vessel for processing and are sold." The statute provides no remedy to merchant seamen, no remedy to fishermen who ship on an oral contract, no remedy to fishermen whose fish are sold by the owner prior to processing, and, arguably, no remedy even to plaintiffs whose fish is processed aboard prior to delivery to anyone.[12] Congress could not have intended this narrow and unusual

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[12] Plaintiffs argued below that they were not even covered by the statute. The Court of Appeals dismissed this argument, stating only that the shipowner owned the boat as well as the processing equipment, so that delivery could be implied. (App. A at note 4).

statute to occupy the field of fishermen's wage liens.

A literal reading of the statute leads to a conclusion contrary to that of the Court of Appeals. Section 10602(c) states that the statute "does *not affect a common law right* of a seaman to bring an action to recover the seaman's share of the fish or proceeds." The language Congress used is a strong argument that it intended the usual presumption to prevail -- that the statute provides a cumulative remedy and that it does not diminish existing remedies provided to seamen by the general maritime law. By using the words "common law," Congress meant to refer to non-statutory law, the same meaning often ascribed to the term by the courts. *See e.g. Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 422 (1954) (Referring to non-statutory maritime law as "maritime common law"); *Federal Marine Terminals v. Burnside Shipping Co.*,

394 U.S. at 411 (Stating that the Court of Appeals decision that there was no "common law direct action" was equivalent to a holding that there would be no "federal maritime action," in the absence of a statutory source for the remedy.)

The Court of Appeals proved the point in the very sentence it used to hold that §10602 preempted plaintiffs' non-statutory claims. The Court of Appeals wrote: "When Congressional legislation directly addresses a question, that legislation preempts existing federal common law." 14 F.3d at 1408 (App. A at 9). What the Court of Appeals did not recognize is that preemption does not occur when Congress expressly preserves common law claims, as it did in §10602(c).[13]

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[13] To add emphasis to the point that Congress did not intend §10602 to diminish the rights of seamen, it added an express qualifier to the provision establishing the six month limitation provision. The limitation provision applies only to an "action under this section." Congress did not want there to be any misunderstanding that

3. Legislative History Shows that Congress Intended §10602 to Provide a Cumulative Remedy

The statute's purpose as a cumulative remedy for a narrow class of plaintiffs may be understood by examining its eighteenth century origins.

The original purpose of the predecessor of §10602 was to ensure that fisherman got their share of salt allowances or bounties that the federal government paid to those engaged in the cod fisheries. In 1792 the Second Congress passed the predecessor of §10602. Act of February 16, 1792 § 5, 1 Stat. at 229, 230. It was part of an act whose purpose was to compensate fishermen and vessel owners for the added cost of duties on imported salt used to preserve "dried fish." *Id.* at § 1. Application of the act was limited to vessels and fishermen "carrying on the bank and other cod

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fishermen would have only six months to bring actions under general maritime law.

fisheries," *id.*, because dried salt cod was the product that most utilized imported salt.[14]

Consistent with this limited purpose, the act provided cod fishermen with an *in rem* remedy to recover their share of the bounties and the proceeds of the fish after it was given to the vessel owner for curing:

> [Where the fish] shall be delivered to the owner or to his agent, for cure, and shall be sold by the owner or agent, such vessel shall for the term of six months after such sale, be liable and answerable for the skipper's and every other fisherman's share of the fish. . .

In the 200 years since the statute was enacted Congress has not materially expanded its scope. The salt bounties were

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[14] The predecessor of §10601, which was contained in the same act, provided that the bounties were available only to vessels that entered into written contracts with their fishermen. *Id.* at § 4. The purpose of this section was to provide a written record of the fisherman's right to the bounties. *See Crowell v. United States*, 6 F. Cas. 912 (C.C.D. Mass. 1856)(No. 3,447)(Right to bounty ceases if any material portion of fisherman contract is not in writing.)

finally repealed in 1866, but the remainder of the statute continued virtually unchanged until 1988.

In 1988 Congress changed the word "cure" to "processing" and eliminated the portion of the act that restricted it to the cod and mackerel fisheries.[15] *Id.* The legislative history shows that Congress believed that the changes were immaterial. The 1988 revision was tacked onto the end of the Commercial Fishing Vessel Safety Act of 1988, P.L. 100-424, 102 Stat. 1585, 1591-92. The House Committee on Merchant Marine and Fisheries published an extensive report on the act, but the report ignored the changes to §10602. *See* 1988 U.S. Code Cong. and Admin. News, at 2149 *et seq.* Although both the House and the Senate debated passage of the act, no representa-

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[15] In 1865 Congress had extended the act to include both the cod and the mackerel fisheries. Act of March 3, 1865, 13 Stat. Ch. 117.

tive nor senator acknowledged the existence of either §10601 or §10602. Cong. Record - House June 27, 1988; Cong. Record - Senate August 11, 1988 (both considering debate on H.B. 1841). The lack of any mention of the changes in the legislative history belies any inference that Congress intended to make a major change in the law of seamen's wage claim remedies. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979)("This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.")

4. The Merchant Seamen's Equivalent to §10602 Provided a Cumulative Remedy Only

The treatment accorded a similar statute by the admiralty courts is strong evidence that §10602 is not the fisherman's exclusive *in rem* remedy. In 1790, two years before Congress enacted the predecessor of §10602, it passed a similar act that gave

an *in rem* remedy to merchant seamen, provided they followed procedures set out in the statute for summoning the vessel master to show cause why the vessel should not be arrested. *Murray v. Ferry-Boat Nimick*, 2 F. 86, 87 (W.D.Pa. 1880)[16] In *Murray* the issue was whether the show cause procedure was the exclusive *in rem* remedy available to merchant seamen. The court held that it was not; the merchant seaman's general maritime remedy was preserved, and the statute conferred an alternate remedy:

> [T]he remedy conferred by the statute is not exclusive, but cumulative. . . the right of the seaman to arrest the vessel is not dependent upon a previous resort to the statute.

Murray, 2 F. at 88. The court based its decision on the maritime rule of construction that was echoed 70 years later by this Court in *Isbrandtsen*:

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[16] The statute survived until 1983, most recently as 46 U.S.C. §§ 603 & 604.

> [U]nder the maritime law, the well settled rule of construction [is] that where a statute provides a new remedy it is cumulative, unless the statute expressly or by necessary implication takes away the common law remedy.

Id.

The statute at issue in *Murray* could be read to be the exclusive *in rem* remedy for merchant seamen much more easily than §10602 could be read to be a fisherman's exclusive *in rem* remedy. The merchant marine statute required a finding of just cause before the vessel could be arrested: "If the master against whom such summons is issued . . . fails to show the wages are paid . . . the clerk of such court shall issue process against the vessel." 46 U.S.C. § 604 (repealed 1983). Despite this language courts held that a merchant seaman could have his vessel arrested without resort to the show cause procedure - if he based his claim on the general maritime law. The strong policy that resulted in

the merchant seamen having both a statutory and a general maritime *in rem* remedy requires the same result here.

5. The Statute's Punitive Remedy for Failure to Provide an Accounting Explains the Short Limitation Period

Section 10602 has always provided an accounting remedy that is in addition to what is provided by the general maritime law. The current version, §10602(b)(1), reads:

> In an action under this section, the owner shall produce an accounting of the sale and division of proceeds under the agreement. If the owner fails to produce the accounting, the vessel is liable for the highest value alleged for the shares. . . .

In the 18th and 19th centuries this right to an accounting in admiralty was a substantial benefit not provided by the general maritime law. *See The Fair Play*, 8 F. Cas. 957, 957-58 (S.D.N.Y. 1830)(No. 4,615).

The provision for an accounting was included in the 1792 act because, if the vessel owner did his own salting and drying, the fishermen would not receive their shares until the fish was eventually sold well after the voyage. By the time of sale, the fish could well have been commingled with the fish of other vessels or other voyages and an accounting would be necessary to sort out what any one fisherman was owed. To insure that the owner kept the paperwork needed to provide the accounting, the act set forth the penalty provision that survives to this day -- a fisherman is entitled to the "highest value alleged for the [fisherman's] shares," if the shipowner does not provide the accounting required by the statute. §10602(b)(1).

It is this punitive remedy that explains the statute's six month limitation provision. Congress did not wish to give any fisherman the opportunity to delay his

claim beyond the time when it would be unreasonably difficult for the owner to provide an accounting. Congress determined that six months, beginning on the date the accounting could first be done, *i.e.* the date the fish was sold, was a reasonable balancing of the fishermen's need for time to make a claim, against the sting of the punitive remedy that would assessed against the owner in the event that the passage of time made an accounting impossible.

The Court of Appeals dismissed plaintiffs' argument that the statute did not preempt general maritime law with the statement that the statute "directly addresses the question" and with a single citation to *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). In *Mobil Oil* this Court declined to supplement the Death on the High Seas Act ("DOHSA") cause of action with a claim for non-economic damag-

es.[17] In 1920 Congress created the cause of action by enacting DOHSA, which spelled out who could recover, who could be sued, and what damages could be awarded. *Mobil Oil* simply held that the courts could not now add new damage claims to those chosen by Congress. The case here is very different. Unlike DOHSA, §10602 is hardly comprehensive, it applies only to fishermen, only if they sign written contracts, and only if their product is delivered to the owner for processing. Moreover, the issue here is not whether the courts can ***add*** to the remedies specified by Congress, which was the issue in *Mobil Oil*, but whether Congress chose to ***eliminate*** traditional remedies granted by the general maritime law. Consequently, the Court of Appeals should have followed a totally different

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[17] General maritime law traditionally did not provide a wrongful death cause of action. *The Harrisburg*, 119 U.S. 199 (1886).

analysis. Finally, in §10602, unlike in DOHSA, Congress expressly stated its wish to preserve common law remedies.

The limitations framework left in the wake of the Court of Appeals *Fuller* decision is nonsensical. There is no reason for certain fishermen's wage claims to have a six month limitation period, while the claims of merchant seamen are governed by laches. There is no reason for Congress to give fishermen a lien *only* when their fish is processed ashore by the owner, and not otherwise. And, there is no reason for Congress to make *in rem* claims brought by fishermen who signed written agreements subject to the six month statutory limitation period, while fishermen who fish on oral agreements have the longer period afforded by the doctrine of laches.[18]

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[18] In other areas of the law the limitation period for breach of a written contract is universally as long or longer than the period for breach of an oral contact for the obvious reason that

Congress could not have had the intention ascribed to it by the Court of Appeals. It is much more likely that Congress intended that the six month limitation period of §10602 apply only to claims brought under that unique statute, and that seamen continue to retain the remedies traditionally afforded them by the general maritime law, which are subject to being time barred only by the dictates of the laches doctrine.

X. CONCLUSION

A six month limitation period severely diminishes the remedy available to seamen. In no other walk of life do workers face so short a limitation period for bringing a claim for wages. The decision below is a major departure from the deference that

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of the terms of a written contract is not dependent on the fragile memories of the contracting parties. *Compare e.g.* Wash. Rev. Code 4.16.040 (six year limitation period for actions on a written contract) with Wash. Rev. Code 4.16.080 (three year limitation period for actions on a oral contract).

this Court has consistently held is owed to the seamen of our nation. It turns long standing federal policy mandating extra protection for seamen on its head by leaving seamen in worse shape than their land based colleagues.

The impact of the decision goes far beyond the several hundred members of the plaintiff class. For most of the thousands who work 16 hour days for months at a time on the modern factory trawlers of the North Pacific fleet, as well as the tens of thousands of fishermen and process workers who ship out of ports nationwide, the six month limitation period severely undercuts traditional seamen's remedies. The decision's impact will not stay within the fishing industry. The restrictive six month limitation clause will soon become a standard clause in every merchant mariner's contract.

But even more significantly, the decision below reflects the abandonment of a principle, the principle that seamen are in need of and entitled to the special protection of our federal courts. This Court has assigned great importance to the protection of seamen since the earliest days of our Republic. The working conditions that the plaintiffs endured on the *Michelle Irene*, and the ease with which defendants managed to cheat them out of a portion of their wages, are proof that the need of seamen for this Court's special protection is as great today as it has ever been.

The petition should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

RITA FULLER, BABBETTE THAYER, THOMAS WILSON, and the class of similarly situated persons who have worked aboard the F/T MICHELLE IRENE,

Petitioners,

v.

GOLDEN AGE FISHERIES, SIMONSON ENTERPRISES V, INC., MICHELLE IRENE JOINT VENTURE, WESTCOD II, INC., BTI IV, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

14 F.3d 1405

Rita Fuller, Babbette Thayer, Thomas Wilson, and the class of similarly situated persons who have worked aboard the F/T Michelle Irene,

Plaintiffs-Appellants,

v.

Golden Age Fisheries, Simonson Enterprises V, Inc., Michelle Irene Joint Venture, Westcod II, Inc., BTI IV, Inc., et al.,

Defendants-Appellees.

No. 92-35330.
United States Court of Appeals,
Ninth Circuit

Appeal from
the United States District Court for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted Nov. 3, 1993
Decided Jan. 24, 1994

Before: WRIGHT, GOODWIN and HUG, Circuit Judges.

OPINION

GOODWIN, Circuit Judge:

Rita Fuller, Babbette Thayer, and Thomas Wilson ("plaintiffs") appeal a summary judgment for Golden Age Fisheries, Inc., et al. ("defendants") in plaintiffs' action for unpaid wages as crewmembers on several Alaskan fishing voyages.

The district court held that the plaintiffs' *in rem* claims against the vessel were time-barred under 46 U.S.C. § 10602(a). The court also held that plaintiffs' *in personam* wage claims were time-barred under a provision in their employment contracts. Finally, the court held that federal law preempted plaintiffs' minimum wage and overtime claims under Alaska state law. The district court had jurisdiction under 28 U.S.C. § 1333. We have jurisdiction under 28 U.S.C. § 1291, and affirm.

Plaintiffs worked aboard the defendant vessel, F/T PACIFIC ORION, formerly the MICHELLE IRENE (the "MICHELLE IRENE"), at times during the period from September 23, 1989, through November 21, 1990. They brought this action on behalf of approximately 300 seamen and women who were employed as processors and crewmembers and who dispute the division of proceeds from the sale of fish.

The MICHELLE IRENE, a factory trawler whose home port is Seattle, is engaged in the catching and processing of fish at sea. Golden Age Fisheries managed the vessel. The vessel fished off the coast of Alaska during the period covered by this action. Neither fishing nor processing was conducted within three miles of the shoreline of Alaska. The time in port while unloading fish and loading supplies was usually two to three days; trips at sea were typically two to three weeks.

The processed fish was typically unloaded in Dutch Harbor, Alaska, onto a Japanese tramper. The bulk of the product was then shipped to Japan, where it was sold by a commission sales broker. A portion of the catch was sold in the United States. All of the catch harvested between September 23, 1989 and November 21, 1990, was sold by January 31, 1991.

Plaintiffs signed written employment contracts that said they would be paid "crewshares" based on a percentage of the estimated fair market value of the catch. Each contract contained a six-month requirement for asserting claims against the vessel owners.[1] The contract had a choice

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[1]Two different versions of the limitations provision were used during the period at issue. One form of the contract said: "The Crewmember agrees that any legal actions taken by him/her in connection with this Contract shall be brought within six (6) months after the date of the action or shall thereafter be waived. Parties waive any and all rights to attorneys fees."

The other version stated: "Any claim for money arising out of this agreement or employment relationship between crewmember and owner shall be made

of law provision that selected Washington as the governing law.

Plaintiffs brought this action on October 6, 1991. They allege that defendants underestimated the value of the fish, thereby reducing the value of their crewshares and breaching the wage terms of the contract. They also allege that defendants failed to distribute to the crew its agreed percentage of that allegedly underestimated value. Finally, they contend that defendants failed to pay them the minimum wage required under Alaska law.

We review a grant of summary judgment de novo. *Jones v. Union Pacific R.R.*, 968 F.2d 937, 940 (9th Cir.1992).

ANALYSIS

1. *Applicability of 46 U.S.C. § 10602*

Fishing vessels and fish processing ves-

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made in writing within six (6) months after this agreement is completed or terminated; otherwise, such claim shall be waived."

sels weighing at least twenty tons and voyaging from a United States port must enter into a written fishing agreement with each seaman employed on board the vessel. 46 U.S.C. § 10601(a). Each agreement must be signed by the vessel's owner and must include certain delineated terms of the seaman's employment. *Id.* §§ 10601(b) and (c).

Section 10602(a) provides for an *in rem* action against the vessel for unpaid wages. This section allows the seaman to place a lien on the vessel to recover a share of the ship's proceeds. The section reads:

> When fish caught under an agreement under section 10601 of this title are delivered to the owner of the vessel for processing and are sold, the vessel is liable in rem for the wages and shares of the proceeds of the seaman. *An action under this section must be brought within six months after the sale of the fish.* (emphasis added)

The plaintiffs do not dispute that the six-month limitation period had already run when they filed this suit.[2] Instead, they argue that Congress never intended § 10602 to limit the ancient right of fishermen under general maritime law to place a lien on the vessel as security for wages. Citing the history of the section, they contend that § 10602 merely provides a cumulative *in rem* remedy for cod and mackerel fishermen.[3]

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[2]All of the fish caught during the relevant time period was sold by January 31, 1991. Plaintiffs' complaint was not filed until October 16, 1991, eight and one-half months later.

[3]Plaintiffs claim that the predecessor of § 10602 was restricted to the cod and mackerel fisheries and was designed to ensure that fishermen got their share of salt allowances or bounties that the federal government paid to those engaged in such fisheries. *See* 46 U.S.C. § 533 (*repealed by* Commercial Fishing Vessel Safety Act of 1988, P.L. 100-424, § 6(c), 102 Stat. 1592 (Sept. 9, 1988)). They claim that during the 1988 revision of the statute, no representative or senator mentioned the purported changes in the scope of the section. They argue this lack of discussion belies any inference that Congress intended to make a major change in the law of seaman's wage claim remedies.

To support their argument, plaintiffs cite the savings clause in § 10602(c), which reads: "This section does not affect a common law right of a seaman to bring an action to recover the seaman's share of the fish or proceeds. "The district court concluded that the savings clause merely preserves a seaman's common law right to bring an action for wages when there is no written agreement under § 10601. An alternative reading is that the savings clause preserves a seaman's right to proceed *in personam* against the vessel's owners for breach of a written or oral fishing agreement.

[1] We need not decide the preferred reading of the savings clause because the plaintiffs' argument fails under either reading. Their argument would undermine 46 U.S.C. § 10601 *et seq.* altogether. They have cited no congressional history to support their limited view of the stat-

ute, and a plain reading of the language does not support their position. When congressional legislation directly addresses a question, that legislation preempts existing federal common law. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, (1978).

[2] Thus, we affirm the district court's holding that § 10602 applies. Because the plaintiffs did not file their *in rem* claim within the six-month period, it is barred.[4]

2. *Contractual Time Limitation*

We next consider whether the trial court erred by enforcing a time-limitation

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[4]Plaintiffs also argue that they are outside the reach of the statute because § 10602 applies only in cases when the "fish ... are delivered to the owner of the vessel for processing and are sold." They contend that the statute does not apply to factory trawlers, such as the MICHELLE IRENE, where the processing was done on board the ship. This argument is without merit. First, § 10601(a) specifically applies to "fish processing vessel[s]." Second, because the owners of the MICHELLE IRENE own the boat as well as its fish processing equipment, the fish were delivered to the owners for processing.

provision in plaintiffs' employment contracts. The provision required them to assert any claims over their wages within six months after the voyage ended.

Plaintiffs contend that seamen's wage claims historically have been governed by the equitable doctrine of laches. They argue that by signing contracts with a six-month claim limitation, they severely restricted their rights. They contend that this waiver of rights was neither knowing nor intelligent, and was both unfair and unreasonable.

Plaintiffs argue that courts must closely scrutinize contracts limiting the rights of seamen. They rely on a long line of cases that describe seamen as "wards of the court" needing special protections from potentially overreaching ship owners. *See Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248, (1942); *Harris v. Pennsylvania R. Co.*, 50 F.2d

866, 868 (4th Cir.1931); *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6,047).

The Fifth Circuit recently relied on the doctrine providing special protection for seamen in *Castillo v. Spiliada Maritime Corp.*, 937 F.2d 240 (5th Cir. 1991). In *Castillo*, the court said:

> Historically, seamen have enjoyed a special status in our judicial system. They enjoy this status because they occupy a unique position. A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer. Moreover, there exists a great inequality of bargaining position between large shipowners and unsophisticated seamen. Shipowners generally control the availability and the terms of employment.

Id. at 243. We have no quarrel with the traditional view admiralty courts employ in reading articles of employment.

Whoever drafts a limitation of rights must prove that it "was executed freely, without deception or coercion, [ ] that it was made by the seaman with full under-

standing of his rights" and that it is fair to the seaman. *Garrett*, 317 U.S. at 248.

[3] While the district court expressed some reservation about whether the special scrutiny for seamen's contracts was necessary in this case, it nevertheless found that the plaintiffs had sufficient education and experience to read and understand the contracts they signed and were given adequate opportunity to review and discuss their contracts prior to signing them.[5] There was no evidence of overreaching. Even if the evidence is viewed in the light most favorable to the nonmoving party, the plaintiffs failed to pres-

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[5]Both Fuller and Wilson were among the 246 class members in another class action against most of the same defendants, alleging similar fraudulent pay practices. *See Adamek v. Golden Age*, No. C89-1463R (W.D. Wash. 1989). When the Adamek case settled in 1991, the defendants paid the plaintiff class approximately $510,000, plus attorneys fees. Thayer admitted in deposition testimony that she was aware of the litigation dispute at the time she signed her contract with Golden Age Fisheries.

ent a genuine issue of material fact about whether the signing of the contracts involved fraud or coercion.

[4] The limitations period also was not unfair or unreasonable. Congress thought six months was reasonable when it passed § 10602, which sets forth a similar time limitation on bringing *in rem* claims. Thus, the ruling that the plaintiffs' *in personam* claims were time-barred was proper.

3. *Alaska Minimum Wage Claims*

Plaintiffs next contend that the district court erred in finding that federal law precluded their claims under the Alaska minimum wage and overtime statute. The Fair Labor Standards Act ("FLSA") provides an exemption from the Act's wage and overtime provisions for fishermen. It exempts persons employed in "catching ... any kind of fish ... or in the first processing [of the catch] at sea ... in conjunction with

... fishing operations." 29 U.S.C. § 213(a)(5). It also exempts "seamen" from the federal overtime provisions in FLSA. *Id.* § 213(b)(6).

Despite these express exemptions, plaintiffs contend that the Ninth Circuit's decision in *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 2956 (1992), compels us to rule that the FLSA does not preempt their wage and overtime claims.

In *Aubry*, we held that § 213(b)(6) does not preempt California from applying the state's overtime pay laws to certain maritime employees. *Id.* at 1417. We balanced the state and federal interests involved, and said that "states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working*

of the maritime legal system." *Id.* at 1422 (emphasis in original).

We concluded that because the plaintiffs were residents of California who did not engage in "foreign, intercoastal, or coastwise voyages," application of the California labor statutes would not interfere with uniform application of federal admiralty law. *Id.* at 1426-27. Also key to our decision was the fact that the state of California had a "strong interest in protecting maritime employees that reside in the state and [who] work to protect California's coastal environment" through oil spill clean-up operations. *Id.*

Aubry is distinguishable from this case because it does not apply to coastwise voyages and turns on significant state interests not present in this case. Unlike the crewmembers in *Aubry*, plaintiffs here were engaged in coastwise voyages and

their predominant job situs was the high seas rather than the territorial waters of Alaska.[6]

Also important is the fact that plaintiffs here were not Alaska residents, unlike the California resident fishermen in *Aubry*. Here, the fishermen were generally hired and began their employment in Seattle, and at the conclusion of their employment, were typically flown back to Seattle. Their contact with Alaska was minimal compared to the extensive contact the *Aubry* plaintiffs had with the state of California.

[6] Finally, with regard to state interests, defendants submitted a letter from the Alaska Department of Labor indi-

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[6]The plaintiffs contend that coastwise voyages are not involved here because the MICHELLE IRENE left Dutch Harbor, Alaska, fished, and returned to Dutch Harbor." It did not travel up and down the coast." However, the MICHELLE IRENE's home port was Seattle; the voyage to Alaska included international waters; and much of the fishing was on the high seas.

cating that it does not generally exercise jurisdiction over factory trawlers when the employees are primarily hired to work outside of Alaska's borders and the work performed within the state's jurisdictional boundaries is only incidental. The district court correctly concluded that federal law preempts plaintiffs' Alaska state wage and overtime claims. For all of the foregoing reasons, the district court's judgment is **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RITA FULLER, et al., Plaintiffs,	)	NO. C91-1438R
v.	)	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND STRIKING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION
GOLDEN AGE FISHEIRES, et al., Defendants.	)	

THIS MATTER comes before the court on the defendants' motion for summary judgment and on plaintiffs' motion for class certification. Having reviewed the motions, together with all documents filed in support and in opposition, having heard oral argument on defendants' motion for summary judgment, and being fully informed the court finds and rules as follows:

I. FACTUAL BACKGROUND

This lawsuit arises from a series of voyages of the F/T MICHELLE IRENE a catcher-processor which is owned and op-

erated by defendants.[1] Plaintiffs worked as crewmembers aboard the MICHELLE IRENE between September 23, 1989, and November 21, 1990. Most crewmembers signed employment contracts covering the period during which fishing trips were made. These agreements provided for compensation based on crewshares -- each crewmember's pay being based on his assigned share of the estimated value of the saleable seafood caught and processed by the vessel.

On October 16, 1991, plaintiffs filed this breach of contract action, alleging that defendants used an unreasonably low estimate of the fair market value of the fish caught during the time they worked and that they failed to pay the crew the full agreed percentage of the estimate. Plaintiffs also allege violation of Alaska

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[1]The MICHELLE IRENE is now named the F/T PACIFIC ORION. However, for purposes of this motion, the court will continue to refer to the vessel as the MICHELLE IRENE.

statutory minimum wage and overtime provisions.

This is the second suit in the last three years brought before this court by crewmembers of the MICHELLE IRENE against the vessel and its owners for breach of contract based on disagreements over the estimates of crewshares. *Adamek v. Golden Age Fisheries*, No. C89-1463R. Two of these three named plaintiffs, Rita Fuller and Thomas Wilson, were members of the plaintiff class in *Adamek*, which settled prior to trial. *See* Defendants' Memorandum in Support of Summary Judgment at 5 n.5; Declaration of Clemens H. Barnes, Exhibits 8, 13.

Defendants now move for summary judgment on all of plaintiffs' claims. Plaintiffs move for class certification.

II. DISCUSSION

A. Defendants' Motion for Summary Judgment

Defendants move for summary judgment on three grounds. First, they move for summary judgment on all of plaintiffs' claims on the grounds that plaintiffs did not bring their claims within the six-month period specified in their employment contracts. Second, they move for summary judgment on plaintiffs' *in rem* actions under 46 U.S.C. § 10602(a) on the grounds that plaintiffs did not bring their claim within the six-month period specified by that statute. Finally, defendants move for summary judgment on plaintiffs' Alaska minimum wage and overtime claims on the grounds that they are preempted by federal law or precluded by the contractual choice-of-law provision stating that all disputes arising under the contract are to be resolved according to Washington law.

1. Standard of Review

A grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630-631 (9th Cir. 1987); *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985). Summary judgment is not appropriate if "a result other than that proposed by the moving party is possible under the facts and applicable law." *See Aronsen v. Crown Zellerbach*, 662 F.2d 584, 591 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200 (1983).

2. Six-Month Limitation Period in Employment Contract

The employment contracts entered by these plaintiffs each included a paragraph on disputes that states in part, "[a]ny claim for money arising out of this agreement or employment relationship between crewmember and owner shall be made in writting [sic] within six (6) months after this agreement is completed or terminated; otherwise, such claim shall be waived." Affidavit of Larry D. Sund, Exhibit A, ¶ 15 (crewmember contract of Rita Fuller). Whether the six-month limitation provision is enforceable is a matter of law appropriate to resolve on a motion for summary judgment.

The various employment contracts at issue here cover voyages of the MICHELLE IREME between September 23, 1989, and November 21, 1990. Plaintiffs filed this action on October 16, 1991, nearly eleven

months later. Defendants argue that plaintiffs' claims are barred as having been brought beyond the six-month period specified in their contracts. Plaintiffs, on the other hand, argue that the six-month limitation period in P15 of their employment contracts is unenforceable for three reasons. First, plaintiffs argue that the doctrine of laches governs the limitation period for bringing suit in admiralty cases and that only Congress, not the parties, can impose a different limitation period. Second, plaintiffs argue that P15 is, essentially, a contract of adhesion that was not adequately addressed by defendants either at the time plaintiffs signed their contracts or at the various orientation sessions held for these employees. Third, plaintiffs argue that, even if such a limitation provision were generally valid, it should not be applied in this case because six months is

an unreasonable period of time for plaintiffs to discover whether the estimate used by defendants to pay crew shares was unreasonably low.

a. Application of Doctrine of Laches

Ordinarily, absent a statutory limitation period, the doctrine of laches governs the period in which an admiralty suit must be brought. *See Sea Quest Marine Inc. v. Cove Shipping, Inc.*, 474 F. Supp. 164, 167 (W.D. Wash. 1979). A claim is barred by laches only if the plaintiffs' delay in bringing suit is unexcusable and defendants are prejudiced by the delay. *Espino v. Ocean Cargo Line, Ltd.*, 382 F.2d 67, 69 (9th Cir. 1967). Courts consistently have refused to apply state statutes of limitation to admiralty actions. *See Pierre v. Hess Oil Virgin Islands Corporation*, 624 F.2d 445, 450 (3d Cir. 1980); *Sea Quest Marine, Inc.*, 474 F. Supp. at 167 (holding that Washington's

general three-year statute of limitations did not bar claim made within admiralty jurisdiction).

Plaintiffs argue that, because only Congress may enact periods of limitation for admiralty suits, the contractual limitation period contained in the contract is invalid and the doctrine of laches must govern the time period within which plaintiffs must bring this action.

Plaintiffs' argument, however, is incomplete. In cases where courts have declined to impose state statutory limitation periods to admiralty claims, they have focused on the need for the limitation period to be addressed directly to admiralty jurisdiction. There is no basis to conclude, from these cases, that the parties cannot contractually set out a limitation period. Like statutes of limitation set out in maritime statutes, a provision in a contract between a fish-

erman and his vessel limiting the period within which a wage claim must be brought is addressed directly to an admiralty claim. In a different admiralty context, involving a breach of a contract action on the sale of some goods, the Second Circuit upheld a contractual limitation period even where a federal statute provided for a longer limitation period. *See Schnell v. United States*, 30 F.2d 676 (2d Cir.), *cert. denied*, 279 U.S. 858 (1929) (three-month limitation period contained in bill of lading upheld despite applicable Admiralty Act two-year statute of limitation). This court concludes that the doctrine of laches need not, and in this case must not, be applied where the parties have set forth a different contractual limitation period.

b. Contract of Adhesion

Plaintiffs next argue that the six-month limitation period is unenforceable because it was not entered into knowingly or for sufficient consideration. Plaintiffs argue that this court must examine with strict scrutiny the terms of contracts entered into by individual seamen. Plaintiffs argue that individual seamen are viewed as wards of the court and that, if there is an inequality in bargaining power between the seaman and the vessel representatives and the contract contains a sacrifice of rights by the seamen without extraordinary benefits, the contract must be found unreasonable and unjust. *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Maine 1823) (Story, J.). Plaintiffs further argue that defendants have the burden of showing that the seamen fully understood what rights they were giving up when they signed a contract

putting limitations on their ability to bring wage claims, *Harmon v. United States*, 59 F.2d 372, 373 (5th Cir. 1932), and that defendants' burden is particu-\ larly difficult to meet where the seamen are not represented by an attorney or other competent adviser. *Hume v. Moore-McCormack Lines*, 121 F.2d 336, 347 (2d Cir. 1941), *cert. denied*, 314 U.S. 684, (1941).

Plaintiffs argue that, because of the procedures used by defendants during the contract signing process, defendants cannot carry this burden. Specifically, plaintiffs state that the vessel representatives failed adequately to explain the limitation provision, and that plaintiffs did not understand they were giving up any rights in the limitation provision. Plaintiffs state that, although there were various orientation sessions at the times crewmembers signed their contracts, the

limitation provision was never specifically addressed and none of the more than 400 crewmembers who participated in the voyages that are the subject of this lawsuit ever asked questions about the limitation provision. *See* Declaration of Rita Fuller, ¶ 3; Declaration of Babbette THayer, ¶¶ 4-6. Plaintiffs further state that they were not provided with copies of their contracts so they could later examine them to determine whether there was any limitation provision. Declaration of Rita Fuller, ¶ 2; Declaration of Babbette Thayer, ¶ 2.

Finally, plaintiffs argue that there was insufficient consideration for the limitation provision because it was not included in the contract as the result of a collective bargaining process. Plaintiffs argue that such limitation provisions are upheld only where they are part of a collective bargaining agreement. See

Collins v. State of Alaska, 621 F. Supp. 722 (W.D. Wash. 1985), *aff'd*, 823 F.2d 329 (9th Cir. 1987).

Again, plaintiffs' arguments are without merit. Plaintiffs would require too much of the bargaining process. Furthermore, plaintiffs ignore the educational and experience differences between seamen in the 1800s and early part of this century, when Justice Story wrote in Harden that seamen should be considered wards of the court, and seamen in the 1990s. First, plaintiffs misstate the circumstances under which defendants carry a heavy burden to show that seamen understood that they were giving up a valuable right regarding wage claims. *Harmon* and *Hume* both involved contractual provisions under which seamen gave up their right to any wage claim. The contractual provision in this case involves only a limitation on

the period in which plaintiffs must bring their wage claim.

Second, plaintiffs had sufficient opportunity to read and understand the limitation provision prior to signing the contracts. Plaintiffs do not dispute that special orientation sessions were held at which they were given the opportunity to go over their contracts with defendants and at which they were offered copies of their contracts. These particular plaintiffs are fairly well educated. All three are either high school graduates or have received a high school general equivalency diploma. Thus, these plaintiffs certainly have a sufficient educational background to enable them to read and understand their contracts when the contracts were made available to them.

Third, for at least one other category of seamen, merchant seamen, terms of individual written employment contracts are

enforceable unless there has been some overreaching or the provision is contrary to law. *McDonald v. United States*, 292 Fed. 293, (2d Cir. 1923). In other maritime contexts, contractual provisions that specify how rights may be enforced have been routinely upheld absent overriding public policy interests against enforcement of the provisions. In *Lauritzen v. Larsen*, 345 U.S. 571, (1953), the Supreme Court upheld a choice of forum clause in a seaman's contract even though application of Danish law as specified in the contract had the effect of barring the plaintiff seaman's Jones Act claim.

Finally, outside of the admiralty context, a contractual claims limitation period need not be the product of collective bargaining to be enforceable. *Myers v. Western-Southern Life Ins. Co.*, 849 F.2d 259 (6th Cir. 1988) (upholding six-month limitation period in plaintiff's

employment contract with insurance company). The court can find no reason to apply a different standard in an admiralty case. Whereas collective bargaining often has the effect of ensuring more leverage in the contract negotiating process for the employees, this court cannot determine that only limitations in a seaman's contract reached pursuant to a collective bargaining agreement are enforceable.

Although it certainly would have been beneficial for defendants to go over in detail every provision of the contract, in the circumstances of this case the court concludes that plaintiffs were given adequate opportunity to review and discuss their contracts prior to signing them. Representatives of the vessel were available to answer questions, and these plaintiffs, all of whom were fully capable of understanding the six-month limitation period, simply chose either not to attend

the orientation sessions or not to read and ask questions about their contracts.

c. Six-Month Period Unreasonably Short and Against Public Policy

Plaintiffs also argue that the sixmonth limitation period was unreasonably short and contrary to public policy as embodied in RCW 49.48. Plaintiffs argue that defendants' method of determining crew shares and that defendants' reticence in providing information regarding their method of accounting made it difficult for crewmembers to compare the estimated price used to settle their shares with the estimate used by other vessels or with market prices within the six-month limitation period. Plaintiffs argue that, despite their repeated requests for information from defendants, no such information was forthcoming until this lawsuit was filed.

Plaintiffs explain that, under Washington law, a contractual limitation pro-

vision is unenforceable if it undermines the purpose of any statute that provides a right or cause of action that is in furtherance of an important public policy. *Signal Insurance Co. v. Walden*, 10 Wn. App. 350 (1973). Plaintiffs conclude that because RCW 49.48 embodies the public policy of protecting wage earners, *Smaby v. Shrauger*, 9 Wn.2d 691, 699 (1941), the contractual six-month limitation period violates public policy.

These arguments are, again, unavailing. Six months is precisely the period for bringing an *in rem* claim for unpaid wages contemplated by 46 U.S.C. § 10602(a). Congress obviously has determined that six months is not an unreasonably short period of time within which a fisherman must bring an action for wages. As a result, this court fails to see how a six-month period, as a general rule, can be either unreasonably short or in violation of

public policy. In addition, on the facts of this case, the six-month limitation period clearly is not unreasonably short. Plaintiffs had sufficient opportunity to discover all information they needed to pursue this action within the six-month period. Although the fish from a particular voyage may not be sold until months later, each crew typically is paid within two to four weeks of the end of a voyage. The owners of the vessel are paid a provisional settlement for the catch by a Japanese broker at the time the fish are offloaded in Alaska. The crewshares are estimated based on this provisional settlement figure. *See* Declaration of Clemens H. BArnes, Exhibit 1 (affidavit of Stanley Simonson). Thus, plaintiffs have an idea of what their crewshares will be within a month of the end of the voyage. That gives plaintiffs five months in which to determine whether these crewshares are

in violation of any portion of their employment contracts.

In addition, plaintiffs Rita Fuller and Tom Wilson were class members in the *Adamek* litigation and had actual knowledge through that action that the pay practices of defendants were being challenged for voyages prior to November of 1989, nearly two years before this action was filed.[2] Furthermore, the *Adamek* plaintiff class was represented by the same attorney representing plaintiffs in this action.[3]

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[2]If the rule of discovery is used to mark the time when the six-month limitations period begins, as plaintiffs argue it should, the *Adamek* litigation clearly put plaintiffs on notice of a potential cause of action following the first voyage during the period covered by this lawsuit and far more than six months prior to the time plaintiffs filed this action.

[3]Defendants urge the court to rely on cases upholding contractual limitation provisions for filing actions in other contexts such as sales of property, injury to passengers where limitation clauses were included in passenger tickets, damage to cargo and other employment contexts. *See, e.g., Breeland v. Southern Pacific Company*, 231 F.2d 576 (9th Cir. 1955) (former railroad employee's wrongful discharge suit barred by one-year limitation clause contained in collective bargaining agreement); *Myers v. Western-Southern Life Ins. Co.*, 849 F.2d 259 (6th Cir. 1988) (former employee's civil

As the court determines as a matter of law that the six-month contractual limitation provision for bringing claims under plaintiffs' employment contracts is enforceable, defendants are entitled to summary judgment of dismissal of all of plaintiffs' claims as they were brought beyond the six-month period.

3. Statutory Six-Month Limitation on *In Rem* Claims

Defendants next argue that plaintiffs' *in rem* claims also are precluded by the six-month statute of limitations set out in 46 U.S.C. § 10602(a). Plaintiffs, on the other hand, contend that they are bringing their *in rem* cause of action under general maritime law rather than under 46 U.S.C. § 10602(a). They further

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rights action barred by six-month clause contained in employment agreement); *Coleman v. Norwegian Cruise Lines*, 753 F. Supp. 1490 (W.D. Mo. 1991); *Nieto v. S.S. Tinnum*, 170 F. Supp. 295 (S.D.N.Y. 1958). The court finds these cases only minimally instructive.

argue that, in passing the predecessor to § 10602(a), Congress did not intend to supplant the fisherman's general maritime remedy against his vessel for his share of the sale of the catch.

Plaintiffs' argument would undermine 46 U.S.C. 10601, *et seq.* altogether. Under § 10601, for voyages of vessels of more than twenty gross tons, the vessel master is to enter into a written agreement with each seaman. The agreement is to state the period of effectiveness of the agreement, the terms of compensation and any other agreed terms. Section 10602(a) provides that any action based on an agreement made pursuant to § 10601 must be brought within six months after the sale of the fish. Section 10602(b) states that a vessel owner is to produce an accounting of the sale and division of proceeds under any agreement pursuant to § 10601. Section 10602(c) provides that "[t]his section

does not affect a common law right of a seaman to bring an action to recover the seaman's share of the fish or proceeds."

Plaintiffs conclude that this last section, § 10602(c), permits a seaman to choose between bringing an action under § 10602(a) and under general maritime law. Apparently in anticipation of the argument that no seaman would choose to proceed under the six-month limitation in § 10602(a) rather than under general maritime law, plaintiffs argue that the special remedy afforded by § 10602(b)(1) when the vessel owner fails to give an accounting provides the incentive for individuals to proceed under the statute.

The court finds plaintiffs' argument unpersuasive. Where Congressional legislation directly addresses a question, that legislation preempts existing federal common law, *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618. In *Mobil Oil* the

Supreme Court held that plaintiffs' damages were limited to those specified in the Death on the High Seas Act and that, because the Act preempted general maritime law, plaintiffs could not recover additional damages not allowed by the Act. *Id.* Similarly in this case, where a written agreement has been concluded pursuant to § 10601, plaintiffs' sole remedy is provided by § 10602(a) and must be brought within six months. Section 10602(c) is best understood as preserving a seaman's common law right to bring an action for wages where there is no written agreement under § 10601.

Accordingly, the court concludes that plaintiffs' in rem claims are precluded as having been brought beyond the six-month statutory limitation period of 46 U.S.C. § 10602(a).

4. Plaintiffs' Alaska State Claims

Defendants finally contend that plaintiffs' claims based on the Alaska minimum wage and overtime statute would be precluded on the ground that they are barred by federal admiralty law. The plaintiff class in *Adamek* also raised Alaska minimum wage and overtime claims, which this court rejected on the ground that application of such state laws would undermine the uniformity of federal admiralty laws. (*See* Order re: Motions for Summary Judgment, Class Certification and to Fix a Special Bond at 15-18.)

In reaching its decision in *Adamek*, this court relied in part on a decision by the Central District of California in *Pacific Merchant Shipping Ass'n v. Aubry*, 709 F. Supp. 1516 (C.D. Cal. 1989). *Aubry* involved claims under California labor statutes by California resident seamen working largely on state territorial wa-

ters and involving significant state interests -- cleaning oil spills to protect the California coast. On appeal, the Ninth Circuit reversed, holding that the Federal Labor Standards Act did not "preclude enforcement of California's overtime provisions to protect the California resident seamen in this case." *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1419 (9th Cir. 1990). The Ninth Circuit developed a general rule in *Aubry* that "states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not actually conflict with federal law or interfere with the uniform working of the maritime legal system." *Id.* at 1422. The Ninth Circuit concluded that, because the *Aubry* plaintiffs were "resident" employees of California who did not engage in coastwise or international voyages, application of the California labor statutes would not

interfere with uniform application of federal admiralty law.

This court finds that the Ninth Circuit decision in *Aubry* does not compel a different result here than in *Adamek*. Unlike the California resident fishermen in Aubry, these plaintiffs are engaged in coastwise voyages and their predominant job situs is the high seas rather than the territorial waters of the state of Alaska. *See Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 420-21 (1976) (ruling that predominant job situs is controlling factor in determining whether a state can apply its labor laws to a given employment relationship and noting the difficulties that employers would face if they had to take into consideration the various states in which a vessel might have contact). The defendant vessel travels from Washington to Alaska. The fishermen employed by the

vessel are not Alaska residents and, generally, they begin their employment with defendants in the Seattle area. At the conclusion of their employment aboard the vessel, they are typically flown back to Seattle. Their permanent or long-term contact with Alaska is minimal.

Accordingly, plaintiffs' claim under Alaska overtime and minimum wage statutes is unavailing, and defendants' motion for summary judgment must be granted. As the court has determined that summary judgment is appropriate on the grounds that the Alaska statutes interfere with the uniform working of the federal admiralty system, it need not consider defendants' arguments that this court must apply Washington rather than Alaska law to any state claims.

B. Plaintiffs' Motion for Class Certification

As the court has determined that defendants are entitled to summary judgment of dismissal of all claims against them, plaintiffs' motion for class certification will be stricken as moot.

III. CONCLUSION

It is hereby ordered, adjudged and decreed that:

(1) defendants' motion for summary judgment of dismissal of all claims against them is granted; and

(2) plaintiffs' motion for class certification is stricken as moot.

DATED at Seattle, Washington this 9th day of March, 1992.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

CREWMEMBER CONTRACT

THIS CONTRACT for employment as a Crewmember is entered into between Michelle Irene Joint Venture ("Owner"), the Owner of the F/T Michelle Irene, official number 940-866, through its vessel manager Golden Age Fisheries ("Vessel Manager"), and Rita Fuller ("Crewmember").

1. RECITALS: The Owner has retained a Vessel Manager to act on its behalf in directing the day-to-day operations and maintenance of the Vessel, and to conduct the hiring and firing of crew. The Vessel Manager, in turn, may appoint its own representatives, including the ship's officers, to supervise and manage operations and upkeep of the Vessel. The Vessel Manager has agreed to hire the Crewmember on the terms and conditions contained herein.

2. DURATION OF CONTRACT: The term of this Contract shall commence on the day

the Vessel Manager or its representative directs the Crewmember to begin preparing the Vessel for departure, or the date upon which Crewmember actually boards the Vessel, whichever occurs first.

The contract will terminate upon the earlier of:

1) Ninety (90) days from the date the contract commences; or

2) The date the Vessel Manager or his representative gives notice, written or verbal, of termination of the employment set forth in this agreement.

The 90-day Contract period will consist of a series of trips, a trip being defined as the period at sea between product offloads. If at the end of the 90-day period covered by this Contract the Vessel has not completed its current trip, the terms of the Crewmember Contract will be auto-

matically extended until the Vessel returns to port and has offloaded its product. Crewmember may request that this Contract be renewed, but the decision to rehire, renew or extent [sic] this contract rests solely with the Vessel Manager and must be in writing by both parties.

The Crewmember understand that he/she is subject to termination when, in the sole judgment of the Vessel Manager, it is in the best interest of the Vessel to do so.

3. DUTIES: Crewmember agrees to perform such duties as may be requested by the Vessel Manager or its representatives. These duties may include those jobs associated with fishing and processing operations; maintenance and upkeep of the Vessel and its equipment, gear and machinery; and the sanitary and orderly appearance of the Vessel and its accommodations area.

The Crewmember agrees to assist in readying the Vessel and its gear and equipment for each trip, and in loading aboard supplies and equipment, as necessary. At the end of each trip, the Crewmember agrees to assist in unloading and cleaning the Vessel.

4. TRANSPORTATION: Transportation from Seattle to the Vessel will be provided by the Owner. If the Vessel is departing from Seattle, transportation to the fishing grounds will be provided on the Vessel.

Return Transportation will be provided at the Owner's expense if the Crewmember completes the terms of this Contract. If the Crewmember fails to complete the terms of this contract, Crewmember will be responsible for return transportation. When the Vessel is returning to Seattle, trans-

portation will be provided on the Vessel. Return travel at the end of the Contract period must be completed on the next available flight, unless a delay is due to circumstances such as weather, or for the benefit of Owner or Vessel Manager.

5. QUALITY CONTROL: The quality of product produced is of primary importance to the financial success of every fishing trip, and is a determining factor in the crewshare earned. Crewmember attention to product quality, good personal hygiene, health codes and processing area cleanliness and sanitation are required. No compensation will be paid to any Crewmember for product which is not saleable in the intended markets.

6. SAFETY: Crewmember agrees to exercise extreme care around machinery, near open holds, on slipper surfaces and in any

other potentially hazardous situation. Vessel Manager will furnish a hardhat and lifevest for use on deck. Crewmember agrees to wear the hardhat while on deck, while loading or offloading supplies and equipment, while moving about the Vessel in areas of low overhead and as otherwise directed.

Crewmember agrees to participate in all safety drills, and agrees to complete the North Pacific Fishing Vessel Owner's Association video safety course. Copies of the video and accompanying manual are available on the Vessel and at the home office in Seattle.

7. PHYSICAL CONDITION: Crewmember understand that working conditions aboard the Vessel, while designed and supervised to be safe, are difficult, strenuous and sometimes hazardous. Before accepting

employment, Crewmember has considered the risks associated with living and working aboard the Vessel, at sea and in port.

Crewmember represents and warrants that he or she is physically and mentally prepared and able to handle all assigned work for the full term of this agreement and that all statements contained in the medical forms furnished are true, complete and accurate in all respects. Falsification of such records is grounds for immediate dismissal.

8. INJURY: Crewmember agrees to immediately report any accident, illness or injury to Crewmember's supervisor or master and to fill out all required injury and medical report forms immediately and accurately. Before leaving the Vessel upon completion of this Contract or upon

termination, Crewmember agrees to complete and sign an "Employee Status Change" form.

Should Crewmember be entitled to maintenance as a result of injury or illness, maintenance will be paid at the rate of $15.00 per day.

9. REGULATORY VIOLATIONS: Crewmember expressly agrees not to violate, or cause the Vessel to violate, any federal, state or local statute or regulation, including but not limited to, regulations forbidding the retention or destruction off any prohibited species, such as halibut, salmon and crab. Crewmember further agrees that he/she will not seek such potential earnings that may be lost due to seizure of catch as a result of such violation.

Owner, Vessel Manager and Crewmember are committed to maintaining a DRUG

FREE/ALCOHOL FREE ENVIRONMENT. POSSESSION OR USE OF ALCOHOL OR DRUGS WILL RESULT IN IMMEDIATE DISMISSAL. Crewmember agrees that Owner and Vessel Manager may search Crewmember and Crewmember's possessions for drugs or drug paraphenalia, and consents to take drug tests upon request by Vessel Manager.

Crewmember agrees to pay for all damages suffered by the Owner, Vessel Manager, Master and crew resulting from Crewmember's violation of law, regulation or of the above anti-drug policy of the vessel.

10. COMPENSATION: Crewmember will be paid his/her assigned crewshare based on the "Adjusted Gross Stock" of the Vessel for each trip. For the purposes of this Contract, "Adjusted Gross Stock" means the estimated ex-vessel fair market value of

saleable product, FOB Alaska, less the cost of surimi additives.

The value of each crewshare shall be determined by dividing 26.086% of the Adjusted Gross Stock by the total number of crewshares held by all crewmembers and officers on board for that trip.

No compensation will be paid for the time that a Crewmember is not on board the Vessel and in the employ of the Owner. In the event of termination before conclusion of a trip, compensation will be based upon the "Adjusted Gross Stock" for the time the Crewmember was actually on board and in the employ of the Owner. Crewmember will generally be paid his/her share, less authorized deductions, within 2 to 4 weeks following each trip.

11. BONUS: Crewmember who satisfactorily completes the Contract will receive a bonus in the amount of $15% of their total earnings for the contract period. Payment will generally bed made 2 to 4 weeks following Crewmember's completion of Contract.

12. DEDUCTIONS FROM EARNINGS: Crewmember hereby expressly authorizes the Vessel Manager to deduct from the Crewmembers compensation the following items:

a. Value of damage caused by Crewmember to the Vessel and/or its gear and equipment, supplies, catch or product, other than normal wear and tear;

b. Crewmember's ship store purchases;

c. Room and Board. Each Crewmember receiving a crewshare will contribute to the cost of provisions (eg,. groceries) at

a rate of $15.00 for each day of the Crewmember Contract;

d. Packaging material expense. The total cost of all packaging materials used during a trip will be divided equally among Officers and Crewmembers;

e. Amounts advanced to or for the benefit of the Crewmember;

f. All sums required by state and federal law;

g. Room, Board and other expenses or loss of revenue as per Paragraph 14 (Termination).

In the event that deductions exceed the compensation owed to the Crewmember, Crewmember agrees to promptly pay the Vessel Manager the difference between deductions and compensation.

13. ADVANCES: Any advance of earnings made to Crewmember shall be regarded as

loans which are due upon written or verbal demand by Vessel Manager.

14. TERMINATION: The Vessel Manager, his representatives or Crewmember may terminate this Contract at this Contract at any time, with or without cause. Crewmember understands that if he/she quits or is terminated, his/her compensation is based on the Adjusted Gross Stock for the period of employment only. If termination or quiting occurs prior to fishing operations, Crewmember shall not be entitled to any compensation. Crewmembers who quit or are terminated before the end of the Contract period are not eligible for a bonus.

If Crewmember quits or is terminated <u>for cause</u>, Crewmember agrees to pay for room, board and any other expense or loss of revenue incurred by Owner on account of the Crewmember, from the date of termina-

tion until the crewmember leaves the Vessel.

15. DISPUTES: In the event of any dispute or controversy arising out of, in connection with, or in relation to this Contract, the parties agree that this Contract shall be governed by the laws of the State of Washington and that all disputes shall be decided by the courts in King County, Washington. Any claim for money arising out of this agreement or employment relationship between crewmember and owner shall be made in writting [sic] within six (6) months after this agreement is completed or terminated; otherwise, such claim shall be waived.

16. ENTIRE AGREEMENT: This contract is the entire and only agreement between the Crewmember and the Owner. There are no other express or implied agreements. Any

prior written or verbal statements are hereby superseded. This agreement shall not be modified amended or otherwise changes except in writing, signed by both Crewmember and an authorized representative of the Owner.

Both Crewmember and the Vessel Manager's designed representative have read and agreed to the foregoing terms and conditions on this 18th day of NOV, 1989.

CREWMEMBER: NAME Rita Fuller (PRINT)
SIGNATURE /s/ Rita Fuller
CREWSHARE 1.0

VESSEL MANAGER: NAME Bill Barnes (PRINT)
SIGNATURE /s/ Bill Barnes
TITLE Purser

PAYROLL DISTRIBUTION TO FOLLOW IN FAXED LETTER FROM RITA.

CREWMEMBER INFORMATION

Name: Fuller Rita
(last) (first) (middle initial)

Mailing Address: P.O. Box 1515
Waldport Org

Telephone Number: 503563-3796
Birthdate: 5/20/57
Social Security #: 494-64-9351

ARE YOU A U.S. CITIZEN? Yes No

If not, are you legally authorized to work in the U.S.? Yes No.

Have you completed the I-9 Form, page B-3 of this packet? Yes No

IN CASE OF EMERGENCY CONTACT
name: Roger King
address: P.O. Box 1515
Waldport
telephone: 503-563-3796

* * * * * * * * * * * * * * * * *

FOLLOWING ITEMS TO BE COMPLETED BY VESSEL MANAGER

Position: 1st Cook Share 1.0

Point of Hire: Seattle Date of Hire: 11/18/89

NOTE: Share amount indicated here will be honored through the term of this contract unless specifically changed on the Employee Status Change Form.

Has employee filled out:

X I-9 Certificate of employment eligibility

___ employment application

_X_ medical/health history

_X_ IRS W-4 withholding form

_X_ Alaskan Fishing Crewman's License

_X_ Payroll/Newsletter Distribution Request

C-18

FULL SHARE CREWPERSON

1. Is able to handle all fishing related jobs efficiently and professionally.
2. Has a good attitude.
3. Handles necessary jobs without having to be told.
4. Works well with and cooperates with shipmates.
5. Works in a responsible and professional manner.
6. Takes responsibility for maintaining gear, work area, and living quarters in ship shape manner.
7. Follows rules.
8. Handles product with care.
9. Takes responsibility for completing daily work as quickly as possible.

F/T MICHELLE IRENE
Crew Share Settlement
From: 11-17-89 to 12-02-89
Name: FULLER, RITA M.

Production	Pounds Produced	Extended Value
Totals	687.614.1	401,817.90
Your Crew Share: 1.15	0.003163%	1,270.95
Total Earnings		1,270.95
Less Grocerys @15/day x 16 days	240.00	
Less Packaging Expenses	0.00	
	240.00	
Other charges:		
Cash Draws	800.00	
Personal Charges	45.86	
Travel Allowance	74.00	
Total Before Taxes	919.86	
		111.09

Name: FULLER, RITA M.

Accumulated bonus this trip is $190.67

Supreme Court, U.S.
FILED
MAY 23 1994
OFFICE OF THE CLERK

NO. 93-1676

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RITA FULLER, BABBETTE THAYER, THOMAS WILSON, and the class of similarly situated persons who have worked aboard the **F/T MICHELLE IRENE,**

Petitioners,

vs.

GOLDEN AGE FISHERIES; SIMONSON ENTERPRISES V, INC.; MICHELLE IRENE JOINT VENTURE; WESTCOD II, INC.; BTI IV, INC.; et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

I. Nature of the Case and Proceedings Below

All of plaintiffs' claims were dismissed by summary judgment entered by the United States District Court for the Western District of Washington. The district court was unanimously affirmed by the United States Court of Appeals for the Ninth Circuit. Certiorari is not appropriate because this case does not present any important question of federal law, and the Ninth Circuit decision is not in conflict with the controlling decisions of this Court or of any other court of appeals.

Plaintiffs, Rita Fuller, Babbette Thayer, and Thomas Wilson, worked aboard the fishing vessel F/T Michelle Irene (the "Vessel") at various times between September 23, 1989 and November 21, 1990. On October 6, 1991, plaintiffs brought this suit as a class action against the defendants.[1] Plaintiffs' pay was based on a share of the estimated value of the Vessel's catch. Plaintiffs contend that they were

[1] This brief is filed on behalf of defendants Golden Age Fisheries; Simonson Enterprises V, Inc.; Simonson Investments, Inc.; and Stanley and Rebecca Simonson. Simonson Enterprises V, Inc. and Simonson Investments, Inc. were Washington corporations. Since the filing of this lawsuit, these two corporations have been merged into a successor corporation, Simonson Enterprises IV, Inc. Simonson Enterprises IV, Inc. has no parent company and no corporate subsidiaries.

underpaid because defendants underestimated the value of the catch, and because the owners paid some of the plaintiffs' share to other crew members not entitled to a share.

Plaintiffs worked pursuant to written employment contracts, which provided a six-month time limit for the assertion of all claims. Because plaintiffs did not raise their claims or bring suit within six months, the district court granted summary judgment, dismissing all of plaintiffs' in personam and in rem claims. The court ruled that plaintiffs' in rem claims were also barred by the six-month limitation imposed by 46 U.S.C. § 10602(a). The Ninth Circuit Court of Appeals affirmed the district court.[2]

II. Statement of Facts Relevant to the Issues Presented for Review

A. Background

Plaintiffs' employment contracts were for terms of approximately 90 days, covering several successive trips. Every plaintiff signed an employment contract or contracts containing the six-month clause.[3] It is undisputed that all of

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[2] Plaintiffs' Alaska state law claims were also dismissed on summary judgment. These claims are no longer at issue, since plaintiffs do not seek review of the dismissal of these claims.

[3] At some point during the period at issue in this case, defendants modified the employment contracts used with crew members. Thus, depending on when and how long they were employed by the defendants, plaintiffs signed one of two different versions, or both, of the

the six-month limitation periods set forth in the employment contracts had expired when plaintiffs filed this lawsuit. It is also undisputed that no plaintiff made a written claim of any kind against defendants prior to the end of the six-month limitation periods.

After each of the Vessel's trips, the fish were off-loaded, usually in an Alaskan port. The bulk of the fish product was shipped from Alaska to Japan, where it was sold by a commission sales broker. Typically, the fish were sold a few months after the end of each trip. Fish caught on the Vessel during the voyages at issue were sold by January 31, 1991, over eight months before the filing of this lawsuit.

B. The Crew Members Had Ample Opportunity to Review the Six-Month Limitation Provision in Their Contracts

Plaintiffs have mischaracterized the facts surrounding the signing of the employment contracts, making a number of selective omissions in their description of the contract signing process. There was no trickery or coercion involved in this process. To the contrary, defendants made every reasonable effort to explain the provisions of the crew member agreements to the crew before the agreements were signed. Every plaintiff either read, or had the opportunity to read, his or her employment contract prior to its signing. In fact, every

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limitation clauses. See Plaintiffs' Petition for Writ of Certiorari ("Plaintiffs' Petition") at 12.

named plaintiff signed a number of employment contracts, each containing the limitation clause.

The limitation clauses were not hidden in fine print. In easily understandable language, the clauses stated that written claims regarding the employment contract, including legal actions, must be filed within six months.

Typically, new crew members attended an orientation session during which the entire contract was reviewed clause by clause. Crew members were encouraged to ask questions. After the orientation session, crew members met individually with a personnel staff member to sign the contracts. Crew members were then usually offered a copy of their contracts.

Plaintiff Thayer recalled attending at least one orientation session, and acknowledged that she had time to read each of her three employment contracts prior to signing them. She also testified that, although she had the opportunity to ask questions, she did not do so.

Plaintiff Wilson first began work for defendant Golden Age Fisheries on the F/T Browns Point, another fish processing vessel. The Browns Point employment contract contained a limitation clause identical to the provision in the Vessel contracts. Wilson attended an orientation session in connection with the signing of his first contract. At this session, Golden Age Fisheries personnel reviewed the contract's provisions with him. Although he chose not to do so, it is undisputed that Wilson always had the opportunity to

read his contract.[4] In fact, Wilson took a copy of his second contract on the Browns Point with him, and had it reviewed by his father, a Washington state superior court judge.

Plaintiff Fuller acknowledged at her deposition that she read her contracts before signing them.

In addition to the opportunity to review the limitation clauses, plaintiffs had the ability to understand the clauses' meaning. Plaintiffs are competent, educated individuals. Thayer attended high school and obtained her high school general equivalency diploma. Fuller graduated from high school and attended college. Wilson graduated from high school and attended two years of community college, concentrating in pre-med studies.

Finally, plaintiffs were well compensated for the difficult work they performed on board the Vessel, making a significant amount of money in a short period of time. During the period of time covered by this litigation, Fuller earned over $19,118 in just 95 days of work; Wilson earned $7,870 in 58 days; and Thayer earned $28,505 in 240 days.

C. Plaintiffs Were Paid Their Full Crewshares

Whether or not plaintiffs received their entire wages is not relevant to this review. However, plaintiffs' assertion that they did not receive their full wages is without foundation.

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[4] Wilson also conceded at his deposition that the limitation clause was readily understandable.

Under the employment contracts, the crew members were paid shares of the estimated fair market value of the Vessel's product. The use of an estimate was necessary because, pursuant to their contracts, the crew members were paid within two to four weeks after each trip, while the fish from each trip were sold months later in Japan.

The owners of the Vessel were paid a provisional settlement by the commission sales broker at the time the fish were off-loaded in Alaska. This provisional settlement figure was subsequently adjusted after the sale of the fish, depending upon the actual sale price. Based on their experience with the accuracy of the provisional settlement figure over time, defendants used a percentage of the provisional settlement figure as their estimate of the value of the catch for crew member settlement purposes. This business practice was reasonable and resulted in proper payment to the crew.[5]

D. The Challenged Pay Practices Were Known or Discoverable by Plaintiffs Early On

Two of the plaintiffs, Fuller and Wilson, had worked aboard the Vessel previously, and were class members in an earlier lawsuit involving similar wage claims against the Vessel. Adamek v. Golden Age Fisheries, No. 89-1463R

[5] Plaintiffs' allegation that defendants kept a portion of the crew's share apparently refers to a bookkeeping procedure properly used by the defendants, whereby the Japanese broker was reimbursed for the salaries of Japanese technicians aboard the Vessel by assigning crewshares to the technicians.

(W.D. Wash. Stipulation and Order of Dismissal July 17, 1991). Therefore, Fuller and Wilson had actual knowledge that the pay practices challenged in this lawsuit were being questioned as early as November and December 1989, almost two full years before they filed suit in October 1991. All Adamek class members were informed of the issues when the notice of settlement was sent to the class in February 1991. In addition, the Adamek plaintiffs were represented by the same attorney who filed this lawsuit, and who knew of the challenged practices by the fall of 1989.

Plaintiffs note that Thayer was not a class member in the Adamek litigation. Nevertheless, Thayer candidly admitted at her deposition that prior to signing her third and last contract with the defendants, it was "common knowledge" among the crew that the Vessel's pay practices were being challenged in the Adamek litigation.

In any event, defendants did nothing to conceal the manner of calculating crewshares. Pricing information is confidential and sensitive in nature. Thus, it is shared with crew members only upon request, and is not mailed or handed out to crew members. Though the information is guarded, it is available to crew members, and is certainly not concealed.[6]

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[6] For example, when plaintiff Fuller requested accounting information, she received a letter from in-house counsel for the Vessel operators, offering to make such information available to her under proper conditions. Fuller discontinued her efforts to obtain the information after she learned of the filing of the Adamek lawsuit.

SUMMARY OF ARGUMENT

Two lower courts have analyzed the facts of this case and have determined that there is no genuine issue of material fact as to the enforceability of the limitation clauses contained in every employment contract signed by plaintiffs. These courts have held that there is no evidence of trickery, coercion, overreaching, or fraud surrounding the signing of these contracts. In fact, the Ninth Circuit applied the legal standard advocated by plaintiffs for the review of the limitation provisions, and came to the conclusion that these clauses should be enforced against these plaintiffs. The court of appeals decision is consistent with the decisions of this Court.

The Ninth Circuit also held that in enacting 46 U.S.C. § 10602, Congress directly addressed plaintiffs' in rem cause of action against the Vessel, and placed a six-month time limit upon the assertion of that claim. Under this Court's holding in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), because the claim has been directly addressed by Congress, Section 10602 provides plaintiffs' exclusive in rem cause of action. Plaintiffs are not free to bring an in rem claim that disregards Congress' procedural limitation. Plaintiffs' Request for a Writ of Certiorari should be denied.

ARGUMENT

I. The Decision of the Ninth Circuit Court of Appeals Enforcing the Contractual Limitation Clauses Is Consistent With Decisions of This Court and the Lower Federal Courts

It is undisputed that plaintiffs' lawsuit was filed long after the six-month limitation periods imposed by their employment contracts had expired. The only issue with regard to the contractual limitation clauses is whether they are enforceable against plaintiffs in this case. Plaintiffs assert that the clauses should not be enforced against them, solely because of their position as seamen. The Ninth Circuit Court of Appeals held, consistent with the decisions of this Court and the lower federal courts, that under the facts of this case the clauses are fully enforceable and plaintiffs' claims are barred.

A. Contractual Limitation Clauses Are Enforceable Against Seamen

The respective rights and obligations of crew members and their employers are governed by the crew members' employment contracts. McDonald v. United States, 292 F. 593, 594 (2d Cir. 1923); The Joseph B. Thomas, 148 F. 762, 764 (3d Cir. 1906). As the Joseph B. Thomas court stated:

> [I]n making their contracts, [crew members] are not to be exempted from contractual obligations freely and fairly made, and as to which no suspicion of misunderstanding or imposition attaches. Their service on shipboard is regulated by contract, express or implied, and the relation between them and the master of the ship is largely, if not altogether, a contractual one.

148 F. at 764. In fact, federal law requires that crew members on fishing vessels enter into written employment agreements. 46 U.S.C. § 10601. See infra at 16. Unless there has been overreaching, or a term of the agreement is contrary to law, crew members' employment agreements are enforceable. McDonald, 292 F. at 595; Joseph B. Thomas, 148 F. at 764.

Consistent with this principle of law, employment contracts that specify the manner in which a seaman's rights may be enforced have been upheld by courts, even where such decisions effectively bar a seaman's wage claim. E.g., The Joseph B. Thomas, 148 F. at 763-66 (contract provided that crew would not bring wage claims while vessel was detained by ice); Camean v. The F/V Lady Jay, 654 F. Supp. 709 (D. Mass. 1985) (seaman failed to pursue grievance procedure set forth in employment contract, barring breach of contract action); Collins v. Alaska, 621 F. Supp. 722 (W.D. Wash. 1985), aff'd, 823 F.2d 329 (9th Cir. 1987) (crew member agreement replaced traditional maritime personal injury remedies with workers' compensation scheme).

In Lauritzen v. Larsen, 345 U.S. 571 (1953), this Court upheld a choice of law provision in a seaman's employment contract, which had the effect of denying Jones Act coverage for an injury suffered at sea. The Court stated: "Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply." 345 U.S. at 588-89.[7]

B. The Contractual Limitation Clauses in This Case Are Not the Product of Trickery, Coercion, Overreaching or Fraud

Despite the colorful language used in plaintiffs' petition, plaintiffs' complaint does not even allege trickery, coercion, overreaching or fraud. Nor does any factual support exist for such allegations. There is no evidence that

[7] Although the defendants are not aware of a reported case addressing the enforceability of a time limitation clause in a seaman's contract, federal courts routinely uphold such time limitation clauses in other admiralty contexts. For example, in personal injury suits brought by passengers against cruise ships, courts uphold time limitation clauses contained in passengers' tickets, so long as the limitation was reasonably communicated to the passenger and was not unreasonable or fundamentally unfair. Dempsey v. Norwegian Cruise Line, 972 F.2d 998, 999 (9th Cir. 1992); Coleman v. Norwegian Cruise Lines, 753 F. Supp. 1490 (W.D. Mo. 1991). Courts also enforce limitation clauses contained in bills of lading, even where a federal statute provides for a longer limitation period. E.g., Schnell v. United States, 30 F.2d 676 (2d Cir.), cert. denied, 279 U.S. 858 (1929) (three-month limitation period contained in bill of lading upheld despite applicable Admiralty Act two-year statute of limitation). In any event, there is no principled distinction between enforcement of a contractual time limitation clause and enforcement of other procedural or remedial limitations provided by contract.

plaintiffs were pressured into signing their employment contracts. To the contrary, plaintiffs are competent, educated individuals who either read or had an adequate opportunity to read their employment contracts.

It was defendants' usual practice to hold orientation sessions for each new employee, and to go over each provision of the employment contract. Although plaintiffs make much of the fact that no questions were asked regarding the limitation clauses contained in the contracts, it is undisputed that plaintiffs had the opportunity to ask such questions, but chose not to do so. It is also undisputed that most plaintiffs were offered copies of the contracts and simply chose not to take them. Plaintiffs understood the plainly worded limitation clauses, which were not hidden in fine print.

Both the district court and the Ninth Circuit Court of Appeals held that there was no evidence of fraud or overreaching in this case. There is no inconsistency between the Ninth Circuit decision and the decisions of this Court. In fact, in evaluating the circumstances surrounding the signing of the contracts, the court of appeals relied primarily on Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942), a case cited by the plaintiffs, which requires that a seaman's release of all claims be executed freely, without deception or coercion, that it be made by the seaman with a full understanding of his rights, and that it be fair to the seaman. Appendix A at A-11 - 12 (citing Garrett, 317 U.S. at 248).

Plaintiffs cannot argue that the court of appeals adopted an incorrect legal standard. Instead, they assert that the court failed to apply that standard properly to the facts of this case. However, the Ninth Circuit specifically noted the factual circumstances of this case which led it to conclude that the plaintiffs had failed to present a genuine issue of material fact with regard to the contract signing process. The court noted the education and experience of the plaintiffs, their ability to read and understand the employment contracts, and the opportunity given the crew members to review and discuss the contracts prior to signing them. In short, the court found "no evidence of overreaching." Appendix A at A-12.[8]

C. The Six-Month Limitation Is Neither Unfair Nor Unreasonably Short

The Ninth Circuit also held that the six-month time limitation was neither unfair nor unreasonable, noting that Congress has made the determination that six months is a proper limitation period for in rem wage claims brought

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[8] Even if the contract signing process had not met the standard for review of crew member contracts articulated in Garrett, the Ninth Circuit decision would still be correct. Plaintiffs have overstated the degree of protection to which they are entitled by relying exclusively on cases such as Garrett involving the release of substantive rights. See Plaintiffs' Petition at 22-23, and cases cited therein. The contract clauses in this case, however, merely place a procedural limit on the time period in which plaintiffs may exercise their right to bring a wage claim, and do not in any way constitute a release of a substantive right.

against a fishing vessel. Appendix A at A-13 (citing 46 U.S.C. § 10602). If six months is a reasonable limitation period for a seaman's statutory in rem wage claim, it is equally reasonable for the plaintiffs' other wage claims in this case. This is particularly true because a seaman's in rem wage claim, which allows the seaman to place a lien on the vessel itself, is considered his best and most favored remedy. See The John G. Stevens , 170 U.S. 113 (1898).[9]

Six months was certainly enough time for the plaintiffs to decide whether to bring a wage claim in this case. Crew members were paid within two to four weeks after the conclusion of each fishing trip. Under the terms of the limitation clauses, the six-month period began to run with this payment, giving the plaintiffs six full months after receipt of their wages in which to obtain additional accounting information and compare notes with workers on other vessels to determine whether they might have been underpaid. This is precisely how the Adamek plaintiffs came to believe that they had a wage claim against the defendants, and they asserted their claims within the six-month limitation period.[10]

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[9] Courts also routinely enforce six-month limitation clauses in employment contracts. E.g., Myers v. Western-Southern Life Ins. Co., 849 F.2d 259 (6th Cir. 1988) (former employee's civil rights action barred by six-month limitation clause in employment agreement); Beeson v. Schloss, 183 Cal. 618, 192 P. 292 (1920) (action for commissions by former salesman barred by six-month contractual limitation clause).

[10] Under one of the two versions of the limitation clause, something less than the actual filing of a lawsuit, such as a written claim against the defendants, might have tolled the six-month provision. At a

Moreover, each of the named plaintiffs in this case either knew or should have known all information necessary to bring suit well within the six-month time period. Two of the three named plaintiffs, Fuller and Wilson, were class members in the prior Adamek litigation. Plaintiffs assert in their petition that Fuller and Wilson had no knowledge of a potential claim against the defendants until receipt of their Adamek settlement checks in November 1991. See Plaintiffs' Petition at 16. However, these two plaintiffs both testified at deposition that they had actual knowledge that the pay practices challenged in this lawsuit were being questioned as early as November and December 1989, almost two years prior to the filing of this suit. In addition, all Adamek class members were certainly informed of the issues when the Adamek notice of settlement was sent to the class in February 1991, nine months prior to receipt of the settlement checks.

Furthermore, plaintiffs must be charged with constructive knowledge, because as class members they were represented by the same lawyer who filed this lawsuit, and who knew of the challenged practices by the fall of 1989. Deering v. Holcomb, 26 Wash. 588, 597, 67 P. 240 (1901) (knowledge by plaintiff's attorney of facts sufficient to put him on notice of fraud constituted constructive notice to plaintiff sufficient to start statute of limitations). Plaintiff Thayer, who was not a class member in the Adamek litigation, has candidly admitted that before signing her third

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minimum, plaintiffs could have made such a written claim or complaint, yet failed to do so.

and last contract with the defendants, it was "common knowledge" that the Vessel's pay practices were being challenged in court.[11]

The court of appeals properly enforced the contractual limitation clauses in this case. Plaintiffs' petition should be denied.

II. The Decision of the Ninth Circuit Court of Appeals That 46 U.S.C. § 10602 Provides Plaintiffs' Exclusive In Rem Cause of Action Is Consistent With the Decisions of This Court

A. 46 U.S.C. § 10602(a) Bars Plaintiffs' In Rem Claims on Its Face

As discussed above, the contractual limitation clauses bar all of the claims brought by the plaintiffs in this case, both in personam and in rem. Plaintiffs' in rem claims are also barred by statute.

46 U.S.C. § 10601(a) requires fishing vessels and fish processing vessels to make a written agreement with each seaman employed on board the vessel. Each agreement must be signed by the vessel's owner and must include certain terms of the seaman's employment. 46 U.S.C. §§ 10601(b)

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[11] Plaintiffs also assert that the six month time period was unreasonably short because it did not give them sufficient time to obtain detailed accounting information from the defendants, implying that such information was necessary prior to filing suit against defendants. However, plaintiffs did not need detailed accounting information prior to asserting their claims -- they filed this suit without such information, as did the Adamek plaintiffs before them.

and (c). Section 10602(a) then provides for an in rem action against the vessel to recover for a share of the ship's proceeds due under the written agreement. However, this action is subject to a six-month time limit:

> When fish caught under an agreement under section 10601 of this title are delivered to the owner of the vessel for processing and are sold, the vessel is liable in rem for the wages and shares of the proceeds of the seamen. An action under this section must be brought within six months after the sale of the fish.

46 U.S.C. § 10602(a) (emphasis added). Plaintiffs' in rem claims were filed too late and are barred by the statute.

B. 46 U.S.C. § 10602(a) Provides Plaintiffs' Exclusive In Rem Cause of Action

Plaintiffs do not dispute that their complaint was filed more than six months after the sale of the fish, nor do they dispute that their in rem claims are barred by the statute's language. Rather, they contend that the statutory limitation does not apply to them because their claim was brought not under Section 10602, but instead under "general maritime law." This assertion is incorrect because Section 10602(a) provides plaintiffs' exclusive in rem remedy.

1. In Section 10602(a), Congress Has Specifically Addressed the Liability of a Vessel In Rem for the Wages and Shares of a Fisherman

Any non-statutory in rem claim for unpaid wages that existed prior to the enactment of 46 U.S.C. § 10602 was preempted by Congress' creation of the statutory in rem action, and its expansion of that statutory cause of action in 1988. The court of appeals correctly followed this Court's decisions in City of Milwaukee v. Illinois, 451 U.S. 304 (1981) and Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), in holding that Section 10602 provided plaintiffs with their exclusive in rem cause of action.

In cases involving federal statutory preemption of federal common law, a court should

> "start with the assumption" that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

City of Milwaukee, 451 U.S. at 317. Beginning with this assumption, the court then assesses whether a statute "speaks directly to" or addresses a question previously governed by federal common law. City of Milwaukee, 451 U.S. at 314-315; Mobil Oil, 436 U.S. at 625. If so, then the statute preempts existing federal common law. Id. As this Court stated in Mobil Oil:

> [W]hen . . . [Congress] . . . does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

436 U.S. at 625.

In Mobil Oil, an admiralty wrongful death case, the Court held that the plaintiffs were bound by the limitation of damages provision contained in the Death on the High Seas Act. 436 U.S. at 624-626. Because the Act preempted "general maritime law," the plaintiffs could not resort to general maritime law in order to recover additional damages not allowed by the Act. Id. This Court stated:

> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

436 U.S. at 625 (emphasis added).

Congress, in Section 10602(a), has specifically addressed the liability of a vessel in rem for the wages and shares of a fisherman, and has imposed a six-month limit on the exercise of such a claim. This is exactly the same claim that plaintiffs attempt to assert in this case under general maritime law. Allowing a non-statutory in rem action to co-exist alongside the statutory in rem action would render

Section 10602 meaningless. Given the choice between a statutory in rem action subject to a six-month limitation period, and a non-statutory in rem suit free from such a limitation, few plaintiffs would choose to bring the statutory claim.

Anticipating this argument, plaintiffs assert that Section 10602 would retain meaning even in the presence of a non-statutory in rem action. Plaintiffs make this surprising argument by contending that it is the "special remedy" in Section 10602(b)(1) that gives meaning to Section 10602. Section 10602(b)(1) directs the vessel owner to provide an accounting of the fish sale, and provides a remedy should the shipowner fail to make the accounting. Plaintiffs speculate at length about possible legislative motives for the creation of the remedy set forth in Section 10602(b)(1). See Plaintiffs' Petition at 46-47. Such unsupported speculation is of little value in analyzing the statute, and was properly disregarded by the court of appeals.

A reading of the statute demonstrates that the Section 10602(a) provision for an in rem action gives this statute meaning, not the remedy for failure to make an accounting. This is evident from the language of Section 10602(b)(1) itself, which assumes, in its reference to "an action under this section," that an in rem action under Section 10602(a) is a prerequisite to the accounting requirement.[12]

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[12] Nor does Murray v. The Ferry-Boat F.B. Nimick, 2 F. 86 (W.D. Pa. 1880) support plaintiffs' theory. Murray held that a special statutory show cause procedure did not provide the exclusive method or manner by which a merchant seaman could exercise his in rem remedy.

2. Section 10602(c) Does Not Demonstrate Congressional Intent to Preserve a Non-Statutory In Rem Action

Section 10602(c) states:

> This section does not affect a common law right of a seaman to bring an action to recover the seaman's share of the fish or proceeds.

46 U.S.C. § 10602(c). Plaintiffs contend that by this section, Congress intended to preserve a non-statutory in rem cause of action, free of any procedural limitations, at the same time it was creating a statutory in rem cause of action, subject to a six-month limitation. Such a reading of the statute is illogical. The common sense meaning of Section 10602(c) is that the statute does not alter any existing remedies that might be available to the crew member other than the in rem action. A crew member would be free to bring, for example, an in personam action for wages upon either an oral or written contract. Section 10602(c) simply does not show a congressional intent to preserve a federal non-statutory in rem cause of action.

In contrast, Section 10602(a) does not contain an alternate procedure for exercising a remedy, but rather provides the substantive in rem remedy itself. Moreover, in Murray, unlike this case, the statute retained meaning despite the existence of a non-statutory in rem claim, because the statute provided a summary remedy that would be attractive to most merchant seamen. See Murray, 2 F. at 86-87.

3. No Affirmative Congressional Statement of Intent to Preempt Federal Common Law is Necessary For Section 10602 to Create an Exclusive In Rem Cause of Action

Plaintiffs imply that because this is a case involving seamen, the court of appeals should have presumed that Congress did not intend to create an exclusive in rem cause of action, absent a clear statement of congressional intent to the contrary. See Plaintiffs' Petition at 31-32 (citing Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 412 (1969)). However, the fact that Congress did not affirmatively state its intent to create an exclusive in rem cause of action is not dispositive, as neither Mobil Oil nor City of Milwaukee requires such a statement.

To the contrary, this Court held in City of Milwaukee that no "clear and manifest" statement of Congressional purpose is necessary to indicate federal statutory preemption of federal common law. City of Milwaukee, 451 U.S. at 315-317. Moreover, Isbrandtsen actually supports the Ninth Circuit's decision in this case because it provides an example in the admiralty context where no affirmative congressional statement of intent was required by this Court.

Isbrandtsen involved a suit by a seaman against his employer to recover wages. Isbrandtsen, 343 U.S. at 780. The employer sought to set off against the seaman's claim the

medical expenses of another crew member, because the medical expenses were due to injuries caused by the plaintiff. Id. This Court held that the setoff was not available, since Congress had preempted the field by passage of legislation that did not provide for a setoff as a defense to a seaman's claim for wages. Id. at 781-82, 788-89. Consistent with the principles later expressed by this Court in City of Milwaukee and Mobil Oil, Isbrandtsen held that federal common law was preempted by the federal statute, despite the absence of any affirmative congressional statement indicating an intent to preempt federal common law.[13]

Plaintiffs emphasize the allegedly narrow scope of Section 10602, arguing that Congress has not completely "occupied the field" in this case. However, in a case of federal statutory preemption of federal common law, the statute need not be comprehensive, and the field need not be completely occupied. See Mobil Oil, 436 U.S. at 625. The concept to which plaintiffs refer is utilized in cases involving federal preemption of state, not federal, law. In cases of federal-state preemption, because federalism concerns are present, a court should begin with the assumption that the

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[13] In the recent case of United States v. Texas, 113 S. Ct. 1631 (1993), this Court held that the federal Debt Collection Act did not preempt the federal government's common law right to collect prejudgment interest on debts owed to it by the states. Although deciding on the facts of that case that Congress had not "spoken directly to" the question addressed by the common law, this Court reaffirmed that no affirmative congressional statement is necessary in order to find federal statutory preemption of federal common law. 113 S. Ct. at 1634-35.

"historic police powers" of the states are not to be superseded by Congress unless it is the "clear and manifest purpose of Congress." City of Milwaukee, 451 U.S. at 316.

In cases involving federal statutory preemption of federal common law, however, the proper inquiry is whether a legislative scheme "speaks directly to" the remedy at issue. To the extent that a statute does speak directly to a particular issue, that issue is preempted by the federal statute, regardless of the comprehensiveness of the statute.[14]

The Ninth Circuit Court of Appeals correctly applied City of Milwaukee and Mobil Oil to hold that Section 10602 provides plaintiffs' exclusive in rem cause of action in this case.

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[14] The Ninth Circuit's decision in this case is not inconsistent with Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969). In Marine Terminals, Congress had not "spoken directly to" the question. The Marine Terminals court addressed whether an employer whose longshoreman employee was killed in the course of his employment was limited to a statutory subrogation remedy in seeking reimbursement from the vessel owner. 394 U.S. at 407. This Court held that the statutory subrogation right created by the Federal Longshoremen and Harbor Workers Compensation Act did not preclude the employer from pursuing other, different remedies available to it. Id. at 413-14. This is not the situation presented in the case at bar, where plaintiffs seek to pursue the same remedy provided by statute, but without the procedural limits imposed by Congress. Under such circumstances, Congress has spoken directly to the remedy by statute, and the statute provides the exclusive remedy.

CONCLUSION

The Ninth Circuit Court of Appeals decision in this case is consistent with the decisions of this Court and the lower federal courts, and needs no further review. Plaintiffs' petition for certiorari should be denied.

Dated this 23rd day of May, 1994.

Respectfully submitted,

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